(1)

No. 95-5841-CFY
Status: GRANTED

Title: Michael A. Whren and James L. Brown, Petitioners
v.
United States

Docketed:
August 31, 1995

Court: United States Court of Appeals for
the District of Columbia Circuit

See also:
95-5873

Counsel for petitioner: Dale,G. Allen, Wright,Lisa B.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 31 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 8 1995		Waiver of right of respondent United States to respond filed.
4	Sep 14 1995		DISTRIBUTED. October 6, 1995 (Page 11)
5	Oct 2 1995	P	Response requested -- RBG. (Due November 3, 1995)
7	Oct 30 1995		Order extending time to file response to petition until December 4, 1995.
8	Dec 1 1995		Brief of respondent United States in opposition filed.
9	Dec 13 1995		Reply brief of petitioner filed.
10	Dec 14 1995		REDISTRIBUTED. January 5, 1996 (Page 33)
12	Jan 5 1996		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 15, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **********
13	Feb 9 1996		Joint appendix filed.
14	Feb 13 1996		Record filed.
		*	Original record proceedings United States District Court for the District of Columbia.
15	Feb 14 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit.
16	Feb 14 1996		Brief of petitioners Michael Whren and James Brown filed.
17	Feb 16 1996		SET FOR ARGUMENT WEDNESDAY, APRIL 17, 1996. (2ND CASE).
18	Feb 16 1996		Brief amicus curiae of American Civil Liberties Union filed.
19	Feb 16 1996		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
20	Mar 12 1996		Brief amicus curiae of Criminal Justice Legal Foundation filed.
21	Mar 15 1996		CIRCULATED.
22	Mar 15 1996	X	Brief amicus curiae of California District Attorney's Association filed.
23	Mar 15 1996	X	Brief amici curiae of California, et al. filed.
26	Mar 15 1996	X	Brief of respondent United States filed.
24	Apr 9 1996	X	Reply brief of petitioners filed.
25	Apr 17 1996		ARGUED.

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95-5841 (21)

ORIGINAL

No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a pretextual traffic stop undertaken by officers who were prohibited by police department regulations from making traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances would have made such a stop (the test used by the Ninth, Tenth and Eleventh Circuits) or whether such stop was permissible as long as it could have been made because of a traffic violation (the test used by the D.C. Circuit in this case, and the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits).

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Michael A. Whren and James L. Brown, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at United States v. Whren, 53 F.3d 371 (D.C. Cir. 1995), and is reproduced in the Appendix to this Petition (App. 1-6). The district court did not issue a written opinion in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1995. The Court of Appeals denied petitioners' joint petition for rehearing on July 13, 1995 (App. 7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Also at issue is District of Columbia Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (effective July 29, 1986), which provides:

> Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

STATEMENT OF THE CASE

I. Introduction

This case arose because the sight of two young black males in a late model Nissan Pathfinder bearing temporary tags, pausing at a stop sign in Southeast Washington, D.C., aroused the suspicion of an unmarked car full of plainclothes vice officers patrolling for narcotics violations. Turning around to investigate, the officers saw the Pathfinder commit three minor traffic violations before they stopped it a few blocks away and discovered the drugs at issue in this case. This case warrants Supreme Court review because the decision of the Court of Appeals takes the wrong side in a circuit split over the proper Fourth Amendment standard for judging pretextual traffic stops -- a recurring issue that affects all motorists.

This Court should adopt the following Fourth Amendment rule, which differs by only one crucial word from that adopted by the D.C. Circuit in this case: "[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances [would] have stopped the car for the suspected traffic violation." Whren, 53 F.3d at 375 (inserting "would" for "could").

The decision of the court below that such stops are valid so long as they "could have" been made on the basis of a traffic violation, while in accord with the rule in the majority of other circuits (the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth), imposes no practical limitation on police discretion. The better view, adopted by the Ninth, Tenth and Eleventh Circuits, holds that a pretextual stop is reasonable under the Fourth Amendment as long as a reasonable officer "would have" made the traffic stop in question.

Both tests consider only the objective facts of the stop. Neither test involves inquiry into the subjective motivations of the police. Under both tests, the vast majority of pretextual traffic stops are upheld as consistent with the Fourth Amendment. The "would have" test is the appropriate Fourth Amendment standard because it provides for meaningful judicial review of the "reasonableness" of discretionary police action. Here, the stop of the Pathfinder was unreasonable under the Fourth Amendment: No

reasonable officer would have made this traffic stop because it was expressly prohibited by police regulation.

II. Statement of Facts

At 8:25 p.m., on June 10, 1993, District of Columbia Metropolitan Police Department vice officers Efrain Soto and Homer Littlejohn and seven or eight other plainclothes officers were patrolling for drug violations in Southeast Washington, D.C. in two unmarked cars. Whren, 53 F.3d at 372. As the car in which Soto and Littlejohn were patrolling turned left off of Ely Place onto 37th Place heading north, they noticed a recent model Pathfinder with temporary tags stopped at the stop sign on 37th Place where that street deadends into a T-intersection with Ely Place. Id. The driver, Petitioner Brown, was looking down into the lap area of the passenger, Petitioner Whren. Id. Soto testified that the Pathfinder paused at the intersection, with at least one car behind it, for more than twenty seconds. Id.[1]

As the officers made a U-turn to follow the Pathfinder, Soto saw the Pathfinder turn right onto Ely Place without signalling and drive west towards Minnesota Avenue at what he described as an "unreasonable speed." Id.[2] The officers completed their U-turn

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[1] Officer Littlejohn testified that there were no vehicles waiting behind the Pathfinder (Tr. 114, 115).

[2] Officer Littlejohn never claimed to see either the alleged failure to signal or the alleged speeding. To the contrary, he testified that the stop was based on "reasonable suspicion" and elaborated (Tr. 116): "Sir, they were leaving a high drug area. We did not know they had drugs in that vehicle at that time, just had a reasonable suspicion as to their actions as to why they were stopped at the stop sign for so long." For obvious reasons, the government has never argued that two black males in an expensive

and followed the Pathfinder onto Ely Place where they caught up to it as it was stopped at the red light at Minnesota Avenue. Id. The unmarked car pulled up alongside the driver's side of the Pathfinder, facing into and obstructing oncoming traffic and, with the assistance of the second unmarked carload of plainclothes officers, pinning the Pathfinder in on all sides. Id. at 372-373.[3]

As Officer Soto approached the driver's side of the Pathfinder, he saw the passenger holding a plastic bag of what appeared to be crack cocaine in each hand. Id. Officer Soto opened the driver's side door, dove across the front seat and grabbed one of the bags out of Mr. Whren's hand. Id. at 373. Multiple officers descended on the Pathfinder, arresting petitioners and seizing additional crack cocaine and two tinfoils of marijuana/PCP. Id.

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car pausing at a stop sign near a "high drug area" equals a "reasonable articulable suspicion" of anything. Rather, the government has relied solely on the alleged traffic violations as justification for the stop.

[3] Metropolitan Police Department regulations governing permissible traffic enforcement action specifically prohibit the stop made in this case:

> Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (effective July 29, 1986).

III. Proceedings Below

Mr. Whren and Mr. Brown were charged in a four-count indictment with various federal drug offenses based on the contraband seized from the Pathfinder. Id. at 372. The district court (Hon. Norma Holloway Johnson) held an evidentiary hearing and denied petitioners' motions to suppress (id. at 373) (emphasis added):

> There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted and the Court is going to accept the testimony of Officer Soto.

Petitioners were convicted by a jury on all counts. Each was sentenced to 168 months of imprisonment to be followed by ten years of supervised release. Id.

On appeal, the D.C. Circuit held that the district court properly denied petitioners' motions to suppress. Explicitly rejecting the alternative "would have" test, the court adopted the Fourth Amendment rule that a traffic stop is always "reasonable" as long as the officer has observed traffic violations for which he could have stopped the car. Id. at 374-375. The Court found the stop in this case valid based on three traffic violations described in Officer Soto's testimony: Mr. Brown failed to give "full time and attention" to his driving (18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4), turned without signalling, and drove away at an unreasonable speed. Id. at 376. The court found it irrelevant that the officers who made the stop were plainclothes vice officers

patrolling for narcotics violations, ignoring entirely the police regulation prohibiting traffic stops by such officers. Id.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO RESOLVE THE 8-3 CIRCUIT SPLIT AS TO THE PROPER TEST FOR EVALUATING PRETEXTUAL TRAFFIC STOPS UNDER THE FOURTH AMENDMENT.

A pretextual stop occurs when the police use a legal justification to make a stop in order to investigate a person for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988). "The classic example, presented in this case, occurs wher an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity." Id.

Pretextual stops are permissible under the Fourth Amendment as long as they are objectively justified: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 134, 138 (1978) (emphasis supplied). The question that has split the circuits is which of two equally objective tests should be applied to determine when an allegedly pretextual stop was objectively justified.

With the addition of this case and a recent Third Circuit decision, eight circuits have now held that a pretextual traffic stop is valid so long as an officer legally could have stopped the

car in question because of a suspected traffic violation. See United States v. Johnson, 1995 U.S. App. LEXIS 22658 (3d Cir. Aug. 16, 1995); United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir.), cert. denied, 115 S. Ct. 207 (1994); United States v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Hasan El, 5 F.3d 726, 727 (4th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994); United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990), cert. denied, 502 U.S. 962 (1991); United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989), cert. denied, 502 U.S. 962 (1991). Cf. United States v. Causey, 834 F.2d 1179 (5th Cir. 1987) (en banc) (pretextual arrest on old warrant; test later applied to pretextual traffic stops).[4]

The Ninth, Tenth and Eleventh Circuits have held, however, that a pretextual stop is objectively justified only if, under the same circumstances, a reasonable officer would have made the stop in the absence of suspicions about other criminal activity. United States v. Cannon, 29 F.3d 472, 475-476 (9th Cir. 1994); United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).[5] The "would have" standard inquires not only into the technical legality of a stop but also into whether it comported with reasonable police practices. Cannon, 29 F.3d at 476.

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[4] See also, e.g., State v. Lopez, 873 P.2d 1127 (Utah 1994); Garcia v. State, 827 S.W.2d 937 (Tex. Crim. App. 1992).

[5] See also, e.g., State v. Izzo, 623 A.2d 1277, 1280 (Me. 1993); Kehoe v. State, 521 So.2d 1094, 1096-1097 (Fla. 1988).

The issue of pretextual traffic stops has been percolating in the circuits for several years. See Cummins v. United States, 502 U.S. 962 (1991) (White, J., describing circuit split in dissent from denial of certiorari). With the Ninth Circuit having recently adopted the minority test, see Cannon, supra, and the D.C. Circuit in this case and the Third Circuit in Johnson having just adopted the majority standard, this long-divisive issue has new currency and is in need of resolution by this Court.

I. The "Would Have" Test Involves No Inquiry Into The Subjective Motivations Of The Police.

The court below reasoned that the "objective 'could have' standard" is better than the "open-ended 'would have' standard" because it "eliminates the necessity for the court's inquiring into an officer's subjective state of mind." Whren, 53 F.3d at 375, citing Maryland v. Macon, 472 U.S. 463, 470-471 (1985). But the "would have" test is also a purely objective standard, looking at the objective circumstances through the eyes of a "reasonable officer," not at the subjective state of mind of the particular officer who made the stop. Cannon, 29 F.3d at 476; Guzman, 864 F.2d at 1515 ("objective analysis of the facts and circumstances of a pretextual stop is appropriate, rather than an inquiry into the officer's subjective intent"); Smith, 799 F.2d at 710 (proper focus is on "objective reasonableness rather than on subjective intent or theoretical possibility").[6] By holding that "'the proper basis of

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[6] The "objective nature of the pretext inquiry" has made it possible for the Tenth Circuit to apply the "would have" test on appeal even where the district court did not reach the issue. United States v. Betancur, 24 F.3d 73, 78 n.4 (10th Cir. 1994).

concern is not with why the officer deviated from the usual practice in this case but simply that he did deviate,'" Guzman, 864 F.2d at 1517 (quoting 1 W. LaFave, Search and Seizure § 1.4(e) at 94 (2d ed. 1987)), this test preserves the requirement of an objective inquiry into Fourth Amendment intrusions without abandoning judicial review of discretionary police action.

II. The "Would Have" Test Is The Only Standard That Places Any Practical Limitation On Police Discretion.

The Court of Appeals acknowledged that petitioners raise "legitimate concerns regarding police conduct" but concluded that the requirement that the police have probable cause of a traffic violation or reasonable suspicion of unlawful conduct before effecting a traffic stop properly "restrain[s] police behavior." Whren, 53 F.3d at 376. This protection is illusory. As a practical matter, the test applied in the majority of circuits subjects motorists driving in those jurisdictions "to unfettered governmental intrusion every time [they] ente[r] an automobile." Delaware v. Prouse, 440 U.S. 648, 663 (1979).

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to '"safeguard the privacy and security of individuals against arbitrary invasions . . . ."'" Prouse, 440 U.S. at 653-54 (citations omitted). Yet the "could have" test insulates, and in fact encourages, police arbitrariness by allowing officers to pick and choose from among the innumerable minor traffic violations they witness every day those that they

will enforce based on wholly improper criteria. Without "standardized police procedures that limit discretion" the decision whether to stop a particular citizen for a particular violation may "tur[n] on no more than . . . 'the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.'" Guzman, 864 F.2d at 1516, quoting Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416 (1974). See also Scopo, 19 F.3d at 786 (Newman, J., concurring); 1 W. LaFave, Search and Seizure § 1.4(e) at 28 (1995 Supp.) (the "poorly reasoned decisions" rejecting the "would have" test "have conferred upon the police virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason"). There can be little doubt that this risk is real.

> As the old adage warns, the more things change, the more they remain the same. In Montgomery, Alabama, on January 26, 1956, police officers arrested and jailed Dr. Martin Luther King, Jr. for allegedly driving thirty miles per hour in a twenty-five mile per hour zone. [citation omitted] Today, everyone readily acknowledges the police officers stopped, arrested, jailed and harassed Dr. King because he was an African-American and because he actively and vigorously sought equal protection and equal treatment for African-Americans.

United States v. Harvey, 16 F.3d 109, 114 (6th Cir.) (Keith, J., dissenting, where officer testified that he stopped car in part because it fit his own personal drug trafficker profile: "There were three young black male occupants in an old vehicle"), cert. denied, 115 S. Ct. 258 (1994). See also State v. Arroyo, 796 P.2d 684, 688 (Utah 1990) (noting trooper's admission that "[a]s a result [of] training at [a] seminar, . . . whenever he observed an Hispanic individual driving a vehicle he wanted to stop that

vehicle" and that "once he stopped an Hispanic driver, 80% of the time he requested permission to search the vehicle").

Because it is virtually impossible to operate a motor vehicle without committing some minor breach of the traffic code, allowing any traffic violation to automatically justify any stop is just one step removed from the completely discretionary permit checks of the type invalidated by this Court in Prouse. Before this Court's decision in Prouse, officers were free to single out motorists on any improper criteria and stop them on the spot. The "could have" test allows officers to single out the very same motorists on the same improper criteria and follow them until the officers catch them in violation of some subsection of the traffic code -- no matter how minor or obscure -- for which no reasonable officer in those circumstances would effect a stop, and then stop them.

> "[G]iven the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [the requirement of a traffic violation] hardly matters, for . . . there exists 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment."

Guzman, 864 F.2d at 1516 (quoting 1 W. LaFave, Search and Seizure § 1.4(e) at 95 (2d ed. 1987), quoting 2 L. Wroth & H. Zobel, Legal Papers of John Adams 141-42 (1965)).

Indeed, this case provides a window on the possibilities for abuse. The Court of Appeals concluded that one proper basis for the stop was Mr. Brown's violation of 18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4, under which an operator "shall, when operating a vehicle, give full time and attention to the operation

of the vehicle." Whren, 53 F.3d at 376. Armed with the "full time and attention" regulation and the "could have" Fourth Amendment standard, an officer could stop any car, anytime, on any improper basis, simply by waiting for the driver to change the radio station, turn to speak to a passenger, read a roadside billboard, or pause briefly at a stop sign to look at a map. With traffic regulations this subjective and nitpicking on the books, the probable cause/reasonable suspicion standards alone are ineffective to check police abuse.

The experience in the Fifth Circuit illustrates the way in which the "could have" test permits police abuse and then insulates it from judicial review. In United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993), cert. denied, 114 S. Ct. 1322 (1994), a Texas state trooper pulled to the shoulder and turned off his lights to observe a van with out-of-state plates and four black occupants. When the van changed lanes (without signalling) in order to give room to the patrol car, the officer stopped the van, obtained consent to search, and found drugs. The Fifth Circuit noted that the arrests of these motorists were part of this particular officer's "remarkable record" for warrantless drug arrests after traffic stops (about 250 of them in five years). "Indeed, this court has become familiar with Trooper Washington's propensity for patroling the fourth amendment's outer frontier." Id. It is troubling to contemplate how many innocent motorists Trooper Washington had to stop -- and what criteria he used to choose them -- in order to net those 250 drug possessors. Yet,

citing the sharply divided en banc decision in Causey, the Fifth Circuit was forced to conclude that its hands were tied (id.):

> Hence, while we do not applaud what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring more serious violations, we may look no further than the court's finding that Trooper Washington had a legitimate basis for stopping the van.[7]

Here, the trial judge implied that she did not necessarily consider the officers' actions reasonable ("[the stop] may not be what some of us believe should be done, or when it should be done, or how it should be done"), but felt constrained to uphold the stop as long as the officers had witnessed some -- any -- technical traffic violation. The trial court's comments highlight the way in which the "could have" test "negates any reasonableness inquiry," Harvey, 16 F.3d at 113 (Keith, J., dissenting). A stop that prompts a federal judge to question its "should," "when" and "how," is likely to be the very sort of "unreasonable" stop that is prohibited by the Fourth Amendment. Yet the trial court mentioned its concerns almost as an aside, apparently feeling powerless to make the kind of reasonableness determination that the Fourth Amendment demands. The "would have" test would not prohibit pretextual traffic stops in general. But it would give courts the authority to strike down the unreasonable ones.

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[7] See also Johnson, 1995 U.S.App. LEXIS 22658, *17 (accepting "abus[e] [of the pretextual stop rules] by the authorities" as "inherent in the nature of law enforcement"); United States v. Cardona-Rivera, 904 F.2d 1149, 1153-54 (7th Cir. 1990) (police testimony that stop was for traffic violations was "not worthy of belief" but stop would be upheld under Trigg test even if there were no other basis for stop).

III. This Traffic Stop Was Objectively Unreasonable Because No Reasonable Officer Would Have Made It.

Under this Court's decision in Scott, a pretextual action by a police officer is valid only if "the circumstances, viewed objectively, justify [the officer's] action." 436 U.S. at 138. Where, under the circumstances, no reasonable officer would have taken a particular action, that action is not "objectively justified" under the Scott standard.

The government has never disputed that Officers Soto and Littlejohn violated General Order 303.1(A)(2)(a) when they took traffic enforcement action while on plainclothes duty in an unmarked vehicle.[8] In fact, the government never disputed that no reasonable officer in those circumstances "would have" effected this traffic stop. Indeed, it is obvious that no reasonable police officer would stop a motorist in direct violation of police regulations: By definition, it is "unreasonable" to violate the regulations that govern the conduct of one's public duties.

The fact that the stop here was made in violation of such a regulation is directly relevant to the essential "reasonableness" inquiry under the Fourth Amendment. Under Terry v. Ohio, 392 U.S. 1, 21-22 (1968), the question for the Court in evaluating the

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[8] Soto's testimony leaves no room to argue that the Pathfinder's actions were within the regulation's exception for grave safety threats. Tr. 72-73 (Pathfinder's violations were not of reckless or dangerous nature and warranted only a "warning," not a ticket). The Court of Appeals did not explicitly address petitioners' argument below that, because this stop was not "objectively authorized" under local police regulations, e.g., Trigg, 878 F.2d at 1041, and, indeed, was explicitly prohibited by such regulations, the stop could not pass muster under even the lax "could have" test.

legality of a stop is "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" One of the "facts available to the officers" in this case was that they were forbidden by police regulations to take traffic enforcement action against the Pathfinder. In light of that fact, a reasonable officer would not believe that stopping the Pathfinder for a minor traffic offense was "appropriate."

As the six dissenters pointed out in the Fifth Circuit's Causey decision, in analyzing Fourth Amendment claims, this Court has repeatedly inquired whether standard police procedures were followed. Causey, 834 F.2d at 1187, citing, e.g., Colorado v. Bertine, 479 U.S. 369, 372 (1987); South Dakota v. Opperman, 428 U.S. 364, 376 (1976). "The emphasis on following standard procedures accords with the principles set forth in Scott. When standard practices . . . are followed, the police are acting in a fashion that is reasonable, objectively viewed, even if they have an ulterior motive. Here, the police were clearly not following standard procedures. . . . Their deviation from their usual practice without just cause made their conduct arbitrary." Causey, 834 F.2d at 1187, 1188. See also United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (indicating that "a departure from established police department practice" might be relevant to a pretextual traffic arrest claim); 1 W. LaFave, Search and Seizure § 1.4(e) at 94 (2d ed. 1987) ("It is the fact of the departure from the accepted way of handling such cases [rather than the reason for

it] which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation").[9]

The "would have" standard merely recognizes that there are some circumstances under which it is not objectively reasonable to stop a car for a particular traffic violation -- for example, when police regulations prohibit the stop. By judging an officer's conduct by what would be expected of a "reasonable officer," the standard petitioners urge this Court to adopt does no more than hold the police to the classic Fourth Amendment test of reasonableness.

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[9] This Court's decision in United States v. Villamonte-Marquez, 462 U.S. 582, 584 n.3 (1983), relied upon by several of the "could have" courts, sheds no light on the issue presented by this petition. The defendants in that case argued unsuccessfully that customs officers could not rely on a special statute allowing suspicionless boarding to inspect a vessel's documentation because the officers were accompanied by state police and were following a tip concerning a vessel in the area carrying drugs. There was no indication in that case that the boarding was in any way a departure from standard customs practice.

The Villamonte-Marquez Court explicitly refused to apply Prouse in the unique context of waterborne vessels, approving the wholly discretionary stops of ships that are clearly forbidden of automobiles. Id. at 588-593. Having approved stops of ships for no reason, the Court was obviously not concerned about pretextual reasons that might give officials an unconstitutional degree of discretion. In any event, nothing in the Court's observation that "'[w]e would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers,'" id. at 584 n.3 (citation omitted), is at all inconsistent with a "would have" test for pretextual traffic stops. The Court's observation assumes that the stop at issue was one that would have been made of an "ordinary, unsuspect vessel." Under the "would have" test, whether a traffic stop is valid or invalid depends not at all on whether the vehicle stopped was suspected of another crime.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

706, 103 S.Ct. 2132, 2149, 76 L.Ed.2d 236 (1983). The statute also grants the Board the power to qualify a prisoner's release on whatever "terms and conditions" the Board sees fit to impose. Unlike the statutes at issue in *Greenholtz* and *Allen*, the District of Columbia Code under no circumstances compels the Board to grant a prisoner release. It therefore creates no "expectancy of release" entitling a prisoner to due process protections. Accordingly, the motions for summary affirmance are granted and the judgment of the district court

Affirmed.

UNITED STATES of America, Appellee

v.

Michael A. WHREN, Appellant.

Nos. 94-3012, 94-3017.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 13, 1995.

Decided May 12, 1995.

Defendant was convicted in the United States District Court for the District of Columbia, Norma Holloway Johnson, J., of possession with intent to distribute 50 grams or more of cocaine base, possession with intent to distribute cocaine base within 1,000 feet of school, possession of marijuana, and possession of phencyclidine (PCP), and he appealed. The Court of Appeals, Sentelle, Circuit Judge, held that: (1) police officers who observed automobile containing defendant commit three traffic violations had articulable and specific facts necessary to establish probable cause to stop automobile, and (2) convictions for both possession with intent to distribute cocaine base within 1,000 feet of school, and its lesser included offense, possession with intent to distribute cocaine based, required remand for entry of amended judgment and resentencing.

Affirmed and remanded.

1. Automobiles ⇐349(2.1)

Traffic stop constitutes limited seizure within meaning of Fourth Amendment, and so must be justified by probable cause or, at least, reasonable suspicion of unlawful conduct, based on specific and articulable facts. U.S.C.A. Const.Amend. 4.

2. Arrest ⇐63.5(6)

Searches and Seizures ⇐60.1

In context of automobile stops and searches, court must look to objective circumstances in determining legitimacy of police conduct under Fourth Amendment. U.S.C.A. Const.Amend. 4.

3. Automobiles ⇐349.5(3)

Regardless of whether police officer subjectively believes that occupants of automobile may be engaging in some other illegal behavior, traffic stop of automobile is permissible as long as reasonable officer in same circumstances could have stopped car for suspected traffic violation. U.S.C.A. Const. Amend. 4.

4. Automobiles ⇐349(2.1)

Police officers who observed automobile containing defendant commit three traffic violations had articulable and specific facts necessary to establish probable cause to stop automobile, and so evidence seized during stop was admisaible. U.S.C.A. Const.Amend. 4.

Appeals from the United States District Court for the District of Columbia, Nos. 93-cr00274, 93-cr00274-02.

Lisa D. Burget, Asst. Federal Public Defender, argued the cause for appellant Michael A. Whren. With her on the briefs was A.J. Kramer, Federal Public Defender.

G. Allen Dale argued the cause and filed the brief for appellant James L. Brown.

Margaret M. Lawton, Asst. U.S. Atty., argued the cause for appellee. With her on the brief were Eric H. Holder, Jr., U.S. Atty., John R. Fisher, Frederick W. Yette and Thomas C. Black, Asst. U.S. Attys.

Before BUCKLEY, WILLIAMS and SENTELLE, Circuit Judges.

SENTELLE, Circuit Judge:

Appellants Michael Whren and James Lester Brown challenge their convictions for federal drug offenses, asserting, among other things, that the District Court erred in denying their motions to suppress physical evidence. Appellants contend that police officers obtained evidence as a result of an illegal search and seizure in violation of appellants' Fourth Amendment rights. Appellants also challenge their convictions and sentences for possession with intent to distribute cocaine base under 21 U.S.C. § 841 (1988), arguing that section 841 is a lesser-included offense of their separate convictions for possession with intent to distribute cocaine base within 1000 feet of a school under 21 U.S.C. § 860(a) (1988). While we reject appellants' Fourth Amendment challenges and otherwise affirm appellants' convictions, we remand for resentencing pursuant to the parties' agreement that section 841 is a lesser-included offense of a section 860(a) offense.

I. BACKGROUND

On July 8, 1993, a federal grand jury returned a four-count indictment against appellants Michael Whren and James Lester Brown, charging appellants with (1) possession with intent to distribute 50 grams or more of cocaine base, or crack, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii) (Count One); (2) possession with intent to distribute cocaine base within 1000 feet of a school in violation of 21 U.S.C. § 860(a) (Count Two); (3) possession of a controlled substance (marijuana) in violation of 21 U.S.C. § 844(a) (Count Three); and (4) possession of a controlled substance (phencyclidine ("PCP")) in violation of 21 U.S.C. § 844(a) (Count Four). Following a pre-trial suppression hearing to consider appellants' claim that evidence was seized as a result of a police stop and seizure which violated appellants' Fourth Amendment rights, the District Court denied appellants' motions to suppress physical evidence. After a subsequent jury trial, the jury found appellants guilty on all four counts.

A. *The Suppression Hearing*

The District Court heard extensive evidence in considering appellants' Fourth Amendment claim. The government presented as witnesses the arresting officers, who testified about the events surrounding appellants' arrest. On the evening of June 10, 1993, District of Columbia police officers Efrain Soto, Jr., Homer Littlejohn and several other plainclothes vice officers were patrolling for drug activity in the area of Minnesota Avenue and Ely Place, in Southeast Washington, in two unmarked cars. Officers Soto and Littlejohn were in a car driven by another officer, Investigator Tony Howard.

Soto testified that as the officers turned left off of 37th Place onto Ely Place heading north, he noticed a dark colored Nissan Pathfinder with temporary tags at the stop sign on 37th Place. Soto observed the driver, later identified as Brown, looking down into the lap of the passenger, Whren. Soto testified that at least one car was stopped behind the Pathfinder. As the officers proceeded slowly onto 37th Place, Soto continued to watch the Pathfinder, which Soto testified remained stopped at the intersection for more than twenty seconds obstructing traffic behind it. Investigator Howard had already begun to make a U-turn to tail the Pathfinder when Soto instructed him to follow it. As the officers turned to tail the vehicle, appellants turned west onto Ely Place without signalling and, as Soto testified, "sped off quickly." Soto further testified that the Pathfinder proceeded at an "unreasonable speed."

The officers followed the Pathfinder onto Ely Place, until it stopped at the intersection of Ely Place and Minnesota Avenue, surrounded by several cars in front of it, two behind it, and several to its right. The officers pulled into the eastbound lane of traffic parallel to the Pathfinder on the driver's side. Officer Soto then immediately exited his vehicle and approached the driver's side of the Pathfinder, identifying himself as a

police officer. Officer Littlejohn followed a few steps behind and to the right of Soto.

After noticing that appellants could not pull over because of parked cars to their right, Soto told appellant Brown to put the Pathfinder in park. As he was speaking, Soto noticed that appellant Whren was holding a large clear plastic bag of what the officer suspected to be cocaine base in each hand. Soto yelled "C.S.A." to notify the other officers that he had observed a Controlled Substances Act violation. He testified that, as he reached for the driver's side door, he heard Whren yell "pull off, pull off," and observed Whren pull the cover off of a power window control panel in the passenger door and put one of the large bags into the hidden compartment therein. Soto opened the door, dove across Brown and grabbed the other bag from Whren's left hand. Officer Littlejohn pinned Brown to the back of the driver's seat so that he could not move.

Multiple officers then placed appellants under arrest and searched the Pathfinder at the scene. The officers recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks and a large white rock of crack cocaine from the hidden compartment on the passenger side door, numerous unused ziplock bags, a portable phone and personal papers.

Defense attorneys pressed the arresting officers on their reasons for making the stop. Soto stated that the driver of the vehicle was "not paying full time and attention to his driving." Soto testified that he did not intend to issue a ticket to the driver for stopping too long at the stop sign, but he wished to stop the Pathfinder to inquire why it was obstructing traffic and why it sped off without signalling in a school area. He testified that the decision to stop the Pathfinder was not based upon the "racial profile" of the appellants, but rather on the actions of the driver. Officer Littlejohn's testimony differed only slightly from Soto's with respect to the hand from which Soto seized the drugs, but otherwise confirmed Soto's account.

B. *The District Court's Suppression Ruling*

After hearing the evidence and appellants' argument that the traffic stop was pretextual and thus violated the Fourth Amendment, the District Court denied appellants' motions to suppress the physical evidence. Although the court noted some minor discrepancies between testimony by Littlejohn and Soto, it noted that

> the one thing that was not controverted ... is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted, and the court is going to accept the testimony of Officer Soto.

The court thus concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence."

C. *The Convictions and the Appeal*

Following the court's pre-trial suppression ruling, trial proceeded, and appellants were convicted on all four counts. On January 26, 1994, appellant Whren was sentenced to 168 months incarceration and five years supervised release on count one, 168 months incarceration and ten years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four. All terms were to be served concurrently. Whren was also assessed a fine of $8,800 on each count, all fines to be concurrent with count two, and a special assessment of $150. On February 9, 1994, appellant Brown was sentenced to 168 months incarceration and ten years supervised release on count one, 168 months incarceration and five years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four, all terms to be served concurrently, and a $150 special assessment.

Whren and Brown appeal their convictions and sentences, raising several challenges. Although we have accorded each alleged error full consideration, we believe several do not merit separate discussion. For those challenges to appellants' convictions not discussed specifically herein, we reject appellants' arguments. We thus turn our attention to the two arguments we believe merit separate discussion: (1) that the District Court erred in denying their motions for suppression of physical evidence under the Fourth Amendment; and (2) that count one of appellants' indictment is a lesser-included offense of count two.

II. DISCUSSION

Appellants contend that the District Court erred in denying their motions to suppress physical evidence seized as a result of the traffic stop on June 10, 1993. They argue that the police officers used the alleged traffic violations as a pretext for what in actuality was a search for drugs without probable cause; thus, the search was objectively unreasonable under the Fourth Amendment. Although appellants recognize that this circuit has faced similar circumstances in *United States v. Mitchell*, 951 F.2d 1291 (D.C.Cir. 1991), *cert. denied*, 504 U.S. 924, 112 S.Ct. 1976, 118 L.Ed.2d 576 (1992), they contend that *Mitchell* did not adopt a standard with sufficient specificity to govern this case. Appellants assert that *Mitchell* merely requires a court to "look to objective circumstances ... rather than an officer's state of mind," in determining the legitimacy of police conduct. *Mitchell*, 951 F.2d at 1295. Here, they contend that the objective circumstances did not justify the stop.

Appellants argue that this court should borrow from the law of other circuits in determining whether "objective circumstances" warrant a search. While several circuits hold that an alleged pretextual stop is valid as long as an officer legally "could have" stopped the car in question because of a suspected traffic violation, *see, e.g., United States v. Scopo*, 19 F.3d 777, 782–84 (2d Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 207, 130 L.Ed.2d 136 (1994); *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir.1993), *cert. denied*, — U.S. —, 114 S.Ct. 1374, 128 L.Ed.2d 50 (1994), appellants urge the court to adopt the test laid out by the Tenth and Eleventh Circuits, which have held that a stop is valid only if "under the same circumstances a reasonable officer *would have* made the stop in the absence of the invalid purpose." *United States v. Smith*, 799 F.2d 704, 709 (11th Cir.1986) (emphasis added); *see United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir.1988). Appellants contend that the "would have" test is superior to the "could have" test because the latter fails to place any reasonable limitations on discretionary police conduct, thus "cut[ting] at the heart of the Fourth Amendment." Brief of Appellant Whren at 22.

Finally, appellants assert that the District Court erred in convicting them for violation of 21 U.S.C. § 841 as well as 21 U.S.C. § 860(a), because the former is a lesser-included offense of the latter.

A. *The Traffic Stop and Search*

[1, 2] The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. CONST. amend. IV. The Amendment imposes "a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653–54, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). Because an ordinary traffic stop constitutes a limited seizure within the meaning of the Fourth Amendment, *Prouse*, 440 U.S. at 653, 99 S.Ct. at 1395–96, such action must be justified by probable cause or, at least, reasonable suspicion of unlawful conduct, based upon specific and articulable facts. *See Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). In the context of automobile stops and searches, a court "must look to objective circumstances in determining the legitimacy of police conduct under the Fourth Amendment." *Mitchell*, 951 F.2d at 1295.

In claiming that this court should adopt the "would have" test for determining whether objective circumstances exist to warrant an automobile stop and subsequent search,

appellants argue that pretextual stops are objectively unreasonable because, under the same circumstances, an officer without ulterior purposes would not have stopped the offenders. However, "[e]ven if we agreed that the stop was a mere pretext for a search, that does not mean that a violation of the Fourth Amendment has occurred." *Mitchell*, 951 F.2d at 1295.

Mitchell provides strikingly similar facts to this case. In *Mitchell*, a D.C. police officer, Stone, observed the two defendants, Mitchell and Zollicoffer, drive at a "high rate of speed," stop suddenly, and turn sharply without signalling. *Id.* at 1293. Stone gave chase and pulled their car over after brief pursuit. When Stone went to the window of the car, he had not yet decided whether to issue a citation. As he returned to his car to run a check on the driver, an assisting officer noticed Zollicoffer leaning forward in the passenger seat with his hands inside his coat, as if holding a weapon. The officer ordered the defendants out of the car, searched them, and found weapons on each. *Id.* at 1293–94. Mitchell and Zollicoffer moved to suppress tangible evidence recovered during the stop, but the trial court denied their motions to suppress. *Id.* at 1294.

Against appellants' arguments that the stop was an unlawful pretext to search, this court affirmed. *Id.* at 1299. We reasoned that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense is a minor one." *Id.* at 1295. Officer Stone had observed two of the violations observed by Officer Soto in this case: speeding and turning without a signal. *Id.* Like Officer Soto, Officer Stone had not yet decided whether to issue a citation, but we held that his indecision "does not vitiate the justification for the initial stop." *Id.* In applying the "objective circumstances" test, we noted that "[e]ven a relatively minor offense that would not of itself lead to an arrest can provide a basis for a stop for questioning and inspection of the driver's permit and registration." *Id.* (quoting *United States v. Montgomery*, 561 F.2d 875, 880 (D.C.Cir.1977)). Presented with the fact that the officer had observed the traffic violations, the court concluded that "objective circumstances clearly justified stopping the car." *Id.*

[3] In holding that a traffic stop is reasonable as long as the officer has observed traffic violations by the defendant, *Mitchell* implicitly adopts the standard embraced by the majority of courts which have considered the "pretext" issue. That is, regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation. *See United States v. Scopo*, 19 F.3d at 784 ("[W]here the arresting officer had probable cause to believe that a traffic violation occurred or was occurring in the officer's presence, and was authorized by state or municipal law to effect a custodial arrest for the particular offense, the resulting arrest will not violate the fourth amendment."); *United States v. Hassan El*, 5 F.3d at 730 ("[W]hen an officer observes a traffic offense or other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment."); *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir.1993) (in banc) ("[T]raffic stops based on probable cause, even if other motivations existed, are not illegal."), *cert. denied*, — U.S. —, 115 S.Ct. 97, 130 L.Ed.2d 47 (1994).

We thus reject appellants' suggestion that we adopt the more open-ended "would have" standard of the Tenth and Eleventh Circuits. *See United States v. Smith*, 799 F.2d at 709 (11th Cir.1986); *see also United States v. Guzman*, 864 F.2d at 1517 (10th Cir.1988). The objective "could have" standard provides a more principled method of determining reasonableness for two primary reasons. First, it eliminates the necessity for the court's inquiring into an officer's subjective state of mind, in keeping with the Supreme Court's admonitions that Fourth Amendment inquiries depend "on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time ... and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985). At the same time, in response to appellants' legitimate concerns regarding police conduct, the "could have" test provides a principled limitation on abuse of power. Officers cannot make a traffic stop unless they have probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts—requirements which restrain police behavior. *Cf. Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400.

[4] Applied to the facts of this case, the objective test adopted in *Mitchell* suggests that Officers Soto and Littlejohn had sufficient grounds to stop appellants. The District Court credited the testimony of Soto, who observed three traffic violations when appellant failed to give "full time and attention" to his driving, *see* Title 18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4, turned without signalling, *see id.* at § 2204.3, and drove away at an unreasonable speed. That factual finding is not clearly erroneous. *See United States v. Taylor*, 997 F.2d 1551, 1553 (D.C.Cir.1993) (district court's findings of fact reviewed for clear error). Having seen those violations, Soto had the articulable and specific facts necessary to establish probable cause to stop appellants. *See Mitchell*, 951 F.2d at 1295; *Hassan El*, 5 F.3d at 729–30; *Scopo*, 19 F.3d at 781. Our inquiry goes no further.

We wish to make one point clear in applying the *Mitchell* standard. The *Mitchell* test ensures that the validity of the traffic stop "is not subject to the vagaries of police departments' policies and procedures." *Ferguson*, 8 F.3d at 392. That is, whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop. *See Hassan El*, 5 F.3d at 730 (rejecting defendant's argument that stop was unreasonable because particular arresting officers were plainclothes officers assigned to narcotics duty, not traffic duty). In this instance, it is of no moment that Soto and Littlejohn were vice officers patrolling for drug violations rather than traffic police. When they observed a traffic violation, they, as officers of the law, were constitutionally justified in stopping appellants.

Accordingly, we reject appellants' Fourth Amendment arguments. Because appellants challenge only the stop and not the subsequent search of the Pathfinder, we need inquire no further. We conclude that the District Court properly denied appellants' motions to suppress.

B. *The Lesser-Included Offense.*

Appellants contend that their convictions for violation of 21 U.S.C. § 841(a)(1), which proscribes possession with intent to distribute controlled substances, including cocaine base, should be vacated because that section describes a lesser-included offense of 21 U.S.C. § 860(a), which proscribes possession with intent to distribute a controlled substance within one thousand feet of a school. Appellants rely on *United States v. Williams*, 782 F.Supp. 7, 8–9 (D.D.C.1992), *aff'd without opinion*, 6 F.3d 829 (D.C.Cir. 1993), in which the District Court concluded that section 841 offenses were, in fact, lesser included offenses of section 860(a) offenses. The government agrees with appellants' argument. Consequently, pursuant to the agreement of the parties, we will remand to the District Court for entry of an amended judgment and resentencing on Counts One and Two.

III. CONCLUSION

United States v. Mitchell dictates that police conduct in this case was reasonable. When a police officer observes a traffic violation, his subsequent stop of the vehicle is reasonable because it is supported by probable cause. We thus reject appellants' Fourth Amendment arguments, as well as all claims not discussed specifically herein. We remand, however, for entry of an amendment judgment and resentencing only with respect to Part II.B. above.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3012 **September Term, 1994**

USDC Crim. No. 93-0274

United States of America

v.

Michael A. Whren,

Appellant

and Consolidated Case No. 94-3017

BEFORE: Buckley, Williams, and Sentelle, Circuit Judges

O R D E R

Upon consideration of Appellants' Joint Petition for Rehearing, filed June 26, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3012 **September Term, 1994**

United States of America

v.

Michael A. Whren,

Appellant

and Consolidated Case No. 94-3017

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

O R D E R

Appellants' Joint Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk

95-5341

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN

and

JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

CERTIFICATE OF SERVICE

Lisa B. Wright, a member of the bar of this Court, certifies pursuant to Rule 29 of this Court, that on August 31, 1995, she served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT on counsel for respondent by depositing three copies of said motion and petition in the United States mail at Washington, D.C., first-class postage prepaid, addressed to:

Honorable Drew S. Days, III
Solicitor General of the United States
Department of Justice, Room 5143
Washington, D.C. 20530

All parties required to be served have been served.

Lisa B. Wright

LISA B. WRIGHT
Assistant Federal Public Defender
625 Indiana Avenue, N.W., Suite 550
Washington, D.C. 20004

(10) LB

ORIGINAL

(3)

No. 95-5841

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL A. WHREN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
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14pp

QUESTION PRESENTED

Whether the stop of petitioners' vehicle after police officers observed the driver commit traffic violations violated the Fourth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 94-5841

MICHAEL A. WHREN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 53 F.3d 371.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. A petition for rehearing was denied on July 13, 1995. Pet. App. A7. The petition for a writ of certiorari was filed on August 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of possessing

crack cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possessing crack cocaine with the intent to distribute it within 1,000 feet of a school, in violation of 21 U.S.C. 860(a); possessing marijuana, in violation of 21 U.S.C. 844(a); and possessing phencyclidine ("PCP"), in violation of 21 U.S.C. 844(a). The district court sentenced each petitioner to a total of 168 months' imprisonment, to be followed by a ten-year period of supervised release. Whren was also fined $8,800. The court of appeals affirmed petitioners' convictions, but remanded for resentencing. Pet. App. A1-A7.

1. On the evening of June 10, 1993, several District of Columbia plainclothes police officers were patrolling for drug activity in southeast Washington, driving unmarked cars. Pet. App. A2. As the officers made a left turn, Officer Soto noticed a Nissan Pathfinder with temporary tags stopped at the intersection, and he saw the driver, later identified as petitioner Brown, looking down into the lap of the passenger, petitioner Whren. Soto observed that the Pathfinder remained stopped at the intersection for more than 20 seconds, obstructing at least one car that was stopped behind it. The officers made a U-turn to follow the Pathfinder. As they did so, petitioners turned without signalling and "sped off quickly" at an "unreasonable speed." Ibid.

The officers followed the Pathfinder until it stopped at another intersection, where it was largely boxed in by other cars in front of and behind it and to its right. Pet. App. A2. The officers pulled up next to the Pathfinder on the driver's side.

Officer Soto then approached the driver's side of the Pathfinder, identified himself as a police officer, and told petitioner Brown to put the Pathfinder in park. As Soto was speaking, he saw that Whren was holding two large clear plastic bags of what appeared to be crack cocaine. Soto yelled "C.S.A." to alert the other officers that he had observed a Controlled Substances Act violation. As Soto reached for the driver's side door, petitioner Whren yelled "Pull off, pull off," pulled the cover from a power window control panel in the passenger door, and put one of the large bags into a hidden compartment there. Soto opened the Pathfinder's door, dove across Brown, and grabbed the other bag from Whren's hand. Another officer pinned Brown to the back of the driver's seat. After arresting petitioners, the officers searched the Pathfinder and recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks, and a large white rock of crack cocaine from the hidden compartment in the car door, as well as numerous unused ziplock bags, a portable phone, and personal papers. Pet. App. A2-A3.

2. Petitioners moved to suppress the evidence obtained from their car. Pet. App. A3. At the suppression hearing, Officer Soto testified that he had stopped the Pathfinder because the driver was "not paying full time and attention to his driving." Soto said that he had not intended to give the driver a ticket, but that he had wished to ask why the driver was obstructing traffic and why he had sped off, without signalling, in a school area. Soto testified that the decision to stop the Pathfinder was not based on peti-

tioners' "racial profile," but on the driver's actions. The second officer's testimony essentially confirmed Soto's account. Petitioners argued that the officers' stated reasons for the stop were pretextual, and that the stop violated the Fourth Amendment because it was made without legally sufficient cause. Ibid.

The district court denied petitioners' motions to suppress. See Pet. App. A3. Although the court noted some minor discrepancies between the testimony of the two arresting officers, it explained that "the facts of the stop were not controverted," and that "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." Accepting Soto's testimony, the court concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence." Ibid.

3. The court of appeals affirmed. Pet. App. A1-A6. The court rejected petitioners' argument that a stop to investigate routine traffic violations is constitutionally permissible only if a reasonable police officer would have made the same stop in the absence of any other, constitutionally invalid purpose. Id. at A4-A5. Instead, the court explicitly adopted the rule followed by a majority of other courts of appeals that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected

traffic violation." Id. at A5. The court reasoned (id. at A5-A6) that the "could have" test provides "a more principled method of determining reasonableness" than the "would have" test, because it eliminates any need for a court to inquire into an officer's subjective state of mind, ibid., while at the same time it "provides a principled limitation on abuse of power" by requiring that a stop be supported by "probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts" (id. at A6).

Applying that standard to the facts of this case, the court of appeals concluded (Pet. App. A6) that Brown's failure to give "full time and attention" to his driving, his turning without signalling, and his driving away at an unreasonable speed provided the police with "the articulable and specific facts necessary to establish probable cause to stop" petitioners. The court made clear that it was irrelevant that the officers involved were vice officers who were patrolling for drug offenses, rather than traffic police, because "whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop." Ibid.[1]

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[1] The parties agreed below that 21 U.S.C. 841(a)(1), which proscribes possession with intent to distribute controlled substances, describes a lesser offense included within 21 U.S.C. 860(a), which prohibits the same act within 1,000 feet of a school. The court accordingly remanded the case for entry of an amended judgment vacating petitioners' convictions under Section 841(a)(1), and for resentencing on the remaining counts. Pet. App. A6.

ARGUMENT

Petitioners concede (Pet. 7) that a "pretextual" traffic stop is constitutionally permissible so long as it is "objectively justified." They urge this Court to grant review because the courts of appeals have adopted different tests for analyzing when such objective justification exists. Pet. 7-17. The Court has recently denied certiorari, however, in several cases seeking to raise the same issue. See United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Hassan El, 5 F.3d 726 (4th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994); see also United States v. Sanchez, 38 F.3d 569 (5th Cir. 1994), cert. denied, 115 S. Ct. 1432 (1995); United States v. Cervantes, 19 F.3d 1151 (7th Cir. 1994), cert. denied, 115 S. Ct. 743 (1995); United States v. White, 26 F.3d 1121 (11th Cir.) (Table), cert. denied, 115 S. Ct. 672 (1994).[2] There is no reason for a different disposition here.

The validity of a traffic stop does not turn on the motives of the police officer who makes the stop. This Court has made clear that the validity of searches and seizures under the Fourth Amend-

[2] The Court in recent years has denied review in at least six other cases presenting the question whether a traffic stop based on objectively valid circumstances may be invalidated on the theory that the stop was actually a pretext to investigate other violations of law. See United States v. Cervantes, 947 F.2d 937 (3d Cir. 1991) (Table), cert. denied, 503 U.S. 942 (1992); United States v. Perez, 936 F.2d 574 (6th Cir.) (Table), cert. denied, 502 U.S. 1006 (1991); United States v. Enriquez-Nevarez, 931 F.2d 890 (5th Cir.) (Table), cert. denied, 502 U.S. 962 (1991); United States v. Trigg, 925 F.2d 1064 (7th Cir.), cert. denied, 502 U.S. 962 (1991); United States v. Cummins, 920 F.2d 498 (8th Cir. 1990), cert. denied, 502 U.S. 962 (1991); United States v. Hope, 906 F.2d 254 (7th Cir. 1990), cert. denied, 499 U.S. 983 (1991).

ment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." Scott v. United States, 436 U.S. 128, 138 (1978). That test has been applied in a variety of Fourth Amendment contexts. See, e.g., Florida v. Jimeno, 500 U.S. 248, 250-252 (1991) (scope of consent); Horton v. California, 496 U.S. 128, 138 (1990) (scope of "plain view" doctrine); Graham v. Connor, 490 U.S. 386, 397-399 (1989) (reasonableness of force used to effect arrest); Maryland v. Macon, 472 U.S. 463, 470-471 (1985) (existence of seizure); United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (authority to board vessel for document inspection when other motives may have been present). As the Court explained in Horton v. California, 496 U.S. at 138, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

When law enforcement officers observe a traffic offense, the Fourth Amendment permits them to stop the vehicle involved. See Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam). Accordingly, most of the courts of appeals have held that if officers have probable cause to stop a vehicle for a traffic offense, the resulting stop will satisfy the Fourth Amendment, regardless of the officers' subjective motivations. See, e.g., United States v. Johnson, 63 F.3d 242, 245-247 (3d Cir. 1995), petition for cert. pending, No. 95-6724; United States v. Jeffus, 22 F.3d 554, 556-557 (4th Cir. 1994); United States v. Scopo, 19

F.3d 777, 782-784 (2d Cir). cert. denied, 115 S. Ct. 207 (1994); United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Meyers, 990 F.2d 1083, 1085 (8th Cir. 1993); United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991), cert. denied, 504 U.S. 924 (1992); United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir.), cert. denied, 502 U.S. 962 (1991); United States v. Causey, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc).

The Ninth, Tenth, and Eleventh Circuits have taken a different approach to the pretext issue. Those courts have held that "'in determining when an investigatory stop is unreasonably pretextual, the proper inquiry * * * is not whether the officer could validly have made the stop[,] but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose.'" United States v. Valdez, 931 F.2d 1448, 1450 (11th Cir. 1991) (quoting United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986)); see United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (also quoting Smith); United States v. Cannon, 29 F.3d 472, 474-476 (9th Cir. 1994).[3] Recently, however, the Tenth Circuit, on its own initiative, heard en banc argument to consider whether it should overrule Guzman. United States v. Botero-Ospina, Nc. 94-4006 (argued Sept. 9, 1994; reargued en banc Sept. 27,

[3] Earlier Ninth Circuit decisions applied a subjective test based on the "motivation" or "primary purpose" of the officer who makes the stop. Some recent decisions of the same court have noted the inconsistency between those decisions and Cannon, without purporting to resolve it. See United States v. Perez, 37 F.3d 510, 513 (1994); United States v. Millan, 36 F.3d 886, 888-889 (1994); see also United States v. Hernandez, 55 F.3d 443, 445 n.2 (1995).

1995); see also United States v. Fernandez, 18 F.3d 374, 888-890 (10th Cir. 1994) (Brown, J., dissenting) (suggesting reconsideration of Guzman). Thus, it is possible that the conflict among the courts of appeals will lessen in the near future.

In any event, that conflict does not warrant review in this case. Under the minority analysis, a defendant must prove that a reasonable officer would not have made the stop in question based solely on observation of the particular traffic offense. United States v. Maestas, 2 F.3d 1485, 1489 (10th Cir. 1993). Routine police practice ordinarily includes stopping vehicles that commit traffic offenses in the presence of officers, and defendants cannot usually show otherwise. Thus, there are likely to be few traffic stop cases decided differently depending upon the circuit in which they are litigated. Indeed, to date, pretext claims have rarely succeeded in any circuit.[4] Far more typical are cases finding that the stop was undertaken pursuant to routine police practice.[5]

[4] We are aware of only a handful of such claims that have been accepted. See United States v. Hernandez, 55 F.3d at 445-447; United States v. Millan, 36 F.3d at 889-890; United States v. Lyons, 7 F.3d 973, 976 (10th Cir. 1993); United States v. Morales-Zamora, 974 F.2d 149, 153 (10th Cir. 1992); United States v. Valdez, 931 F.2d at 1451.

[5] See, e.g., United States v. Dirden, 38 F.3d 1131, 1139-1140 (10th Cir. 1994); United States v. Perez, 37 F.3d at 512-513; United States v. Cannon, 29 F.3d at 474-476; United States v. Greenspan, 26 F.3d 1001, 1005 (10th Cir. 1994); United States v. Betancur, 24 F.3d 73, 77-78 (10th Cir. 1994); United States v. Sanchez-Valderuten, 11 F.3d 985, 988-989 (10th Cir. 1993); United States v. Maestas, 2 F.3d 1485, 1489 (10th Cir. 1993); United States v. Harris, 995 F.2d 1004, 1005-1006 (10th Cir. 1993); United States v. Martinez, 983 F.2d 968, 972 (10th Cir. 1992), cert. denied, 113 S. Ct. 2372 (1993); United States v. Harris, 928 F.2d 1113, 1116 (11th Cir. 1991); United States v. Pollock, 926 F.2d 1044, 1047 (11th Cir.), cert. denied 502 U.S. 985 (1991); United

Moreover, petitioners have not demonstrated that this case would be found to be pretextual under the law of any circuit. There is nothing in the record to indicate that a reasonable police officer would have taken no action after seeing petitioners' car stop for an unusually long time at a stop sign, turn abruptly without signalling, and drive off at an "unreasonable speed." Pet. App. A2. A common-sense approach to poliçe practice suggests that a reasonable officer would have stopped the car, at least to seek an explanation for the driver's actions. Given petitioners' failure to offer any evidence to the contrary, it is unlikely that their pretext claim would have fared any better in any other circuit. Compare United States v. Horn, 970 F.2d 728, 731 (10th Cir. 1992) (upholding stop for seat belt and license plate violations).

Finally, petitioners err when they argue (Pet. 15-17) that the stop of their vehicle was objectively unreasonable because the police officers allegedly acted in violation of a general order of the District of Columbia's Metropolitan Police Department.[6] First, we note that petitioners waived that claim by failing to

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States v. Neu, 879 F.2d 805, 808 (10th Cir. 1989); United States v. Erwin, 875 F.2d 268, 272 (10th Cir. 1989).

[6] General Order 303.1(A)(2)(a) provides:

> Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

raise it before trial. See Gov't C.A. Br. 22-23 n.12; Fed. R. Crim. P. 12(b)(3) (motions to suppress evidence must be made before trial). In any event, as the court of appeals held, the constitutional validity of a traffic stop should not be "subject to the vagaries of police departments' policies and procedures." Pet. App. A6 (quoting United States v. Ferguson, 8 F.3d at 392); see also Johnson, 63 F.3d at 247; Scopo, 19 F.3d at 784. That court thus correctly concluded (Pet. App. A6) that it was constitutionally irrelevant that the officers who stopped petitioners "were vice officers patrolling for drug violations rather than traffic police."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
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THOMAS M. GANNON
Attorney

NOVEMBER 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WHREN, MICHAEL A. AND JAMES L. BROWN Petitioner	)	
vs.	)	No. 95-5841
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 1st day of December 1995.

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December 1, 1995

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-5841

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

The Solicitor General does not dispute that the Circuits are currently split 8-3 as to which of two objective tests should be applied to determine when an allegedly pretextual traffic stop was objectively justified. The government suggests, however, that the conflict may soon lessen because the Tenth Circuit has recently heard en banc argument to consider overruling United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (adopting "would have" test). Gov't Opp. at 8-9.[1] But the fact that the Tenth Circuit is struggling to determine the proper Fourth Amendment test only

[1] The Florida Supreme Court recently reaffirmed its adherence to the minority test urged by petitioners, noting that this Court has yet to resolve the split of authority over the proper Fourth Amendment standard. State v. Daniel, No. 84,486, 1995 Fla. LEXIS 1558, *3 n.1 (Sept. 28, 1995). The question in Daniel was certified as being "of great public importance." Id. at *1.

highlights the need for guidance from this Court. The Tenth Circuit's interest in the issue also undercuts the government's argument that it does not matter which test the Circuits apply because traffic stops are generally upheld under both tests. The Tenth Circuit would not have considered the issue "en banc-worthy," and other state and federal courts would not persist in debating the proper test, if the issue were purely academic.

The Solicitor General is wrong in suggesting that petitioners here lose under either test. Gov't Opp. at 10-11. As explained in the Petition at pp. 15-17, the traffic stop in this case cannot pass the "would have" test used by the Ninth, Tenth and Eleventh Circuits and several state courts. The government contends that there is nothing in the record to indicate that a reasonable police officer would not have made this traffic stop. Govt' Opp. 10. Petitioners' contention is that no reasonable officer would have made this stop because it directly violated a police regulation -- District of Columbia Metropolitan Police Department General Order 303.1(A)(2)(a), prohibiting traffic enforcement action by plainclothes officers and officers in unmarked cars except in certain narrow circumstances not present here.

The government has not disputed that the police officers here acted unreasonably in violating the written regulations governing their conduct but argues that petitioners "waived" their reliance on the regulation at issue by failing to raise it prior to trial. Contrary to the government's suggestion, Gov't Opp. at 11, petitioners fully preserved this issue under Fed. R. Crim. P.

12(b)(3) by moving to suppress the evidence found in the Pathfinder on the ground that it was the fruit of a pretextual traffic stop that was unreasonable under the Fourth Amendment. Moreover, at trial, counsel for Mr. Whren attempted on three separate occasions to cross-examine the officers concerning this particular regulation but the court precluded such questioning (Gov't C.A. Br. 23 n.12, citing Tr. 391, 479, 496). Defense counsel explicitly renewed the motion to suppress at the close of the government's case (Tr. 439-40).

In any event, even if the regulation had not been brought to the trial court's attention, it can be considered on appeal in the same manner as any other legal authority. See Barnette v. United States, 525 A.2d 197, 198-199 n.5 (D.C. 1987) (taking notice, sua sponte, of MPD General Order 303.1(G)(1), regulating enforcement of traffic laws against pedestrians). The facts demonstrating the violation of General Order 303.1(A)(2)(a) were fully developed during the suppression hearing. See Pet. App. 2 & Tr. 10 (officers were in plainclothes in unmarked cars); Tr. 72-73 (Pathfinder was not endangering anyone's safety). The D.C. Circuit never suggested that petitioners could not rely on that regulation on appeal.

The government does not dispute that the "would have" test is an objective standard by which to evaluate allegedly pretextual traffic stops but argues against that test on the ground that it makes the constitutional validity of a traffic stop "'subject to the vagaries of police departments' policies and procedures.'" Gov't Opp. at 11, quoting Pet. App. 6 (other quotations omitted).

In fact, the test urged by petitioners merely subjects such stops to the reasonableness requirement of the Fourth Amendment and recognizes that a traffic stop made in violation of police regulations can be an unreasonable seizure even where there exists probable cause of a traffic violation. This Court in United States v. Robinson, 414 U.S. 218 (1973), left open the possibility that established police department practice might be relevant to claims of pretextual police action. The Robinson Court declined to reach Robinson's pretextual traffic arrest claim because 1) Robinson was "lawfully arrested" (which is essentially all the "could have" courts require); and 2) the arrest was "not a departure from established police department practice" (as required by the "would have" courts). Id. at 221 n.1 (emphasis added). The Court explicitly "le[ft] for another day questions which would arise on facts different from these." Id. Because the stop here was a clear violation of police regulations -- a factor that was not present in the pretextual traffic stop cases cited by the government in which this Court has denied certiorari -- this case presents the ideal vehicle for determining whether departure from standard police practice can render an allegedly pretextual traffic stop "unreasonable" under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

95-5841

MICHAEL A. WHREN

and

JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Lisa Burget Wright, a member of the bar of this Court, certifies pursuant to Rule 29 of this Court, that on December 13, 1995, she served the within PETITIONERS' REPLY BRIEF on counsel for respondent by depositing three copies of said reply in the United States mail at Washington, D.C. first-class postage prepaid, addressed to:

Honorable Drew S. Days, III
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All parties required to be served have been served.

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(5)

No. 95-5841

In The

Supreme Court of the United States

October Term, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 31, 1995
Certiorari Granted January 5, 1996

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6/16/93	Preliminary hearing.
7/8/93	Indictment filed.
7/14/93	Arraignment.
8/25/93	Motion filed by James L. Brown to suppress tangible evidence.
9/3/93	Response by USA in opposition to motion to suppress tangible evidence by James L. Brown.
9/7/93	Motion filed by Michael A. Whren for leave to file accompanying motion to suppress evidence. Exhibit: Motion to suppress evidence.
9/13/93	Response by USA in opposition to motion to suppress evidence by Michael A. Whren and motion to suppress tangible evidence by James L. Brown.
10/20/93	Motion filed by Michael A. Whren to suppress evidence.
10/20/93	Motion hearing before Judge Norma H. Johnson as to Michael A. Whren, James L. Brown: Heard and denied motion to suppress evidence as to Michael A. Whren; heard and denied motion to suppress tangible evidence as to James L. Brown.

10/21/93 Jury trial begun.

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7/13/95 Per curiam order filed denying petition for rehearing.

7/13/95 Per curiam order, In Banc, filed denying suggestion for rehearing in banc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	*	CRIMINAL NO. 93-0274
	*	
	*	WASHINGTON, D.C.
v.	*	COURTROOM NO. 4
	*	
MICHAEL A. WHREN,	*	WEDNESDAY,
JAMES L. BROWN,	*	OCTOBER 20, 1993
	*	10:05 A.M.
DEFENDANTS.	*	

****

TRANSCRIPT OF MOTIONS AND TRIAL BEFORE THE
HONORABLE NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

[137] THE COURT: * * * Well, Mr. Whren and Mr. Brown, I have had an opportunity to hear evidence on the motions that you filed to suppress certain evidence, certain tangible evidence recovered on the date of your arrest. I have heard testimony presented by Officers Soto and Littlejohn. I have heard the evidence that [138] the United States wished to present in support of its position that the evidence should not be suppressed, and I have heard evidence as presented by Mr. Whren through Mr. Camenisch from Officer Littlejohn.

Now, it is absolutely true, anyone who has heard the testimony here today knows that not every item of evidence was indeed consistent. There were differences indicated and there were efforts made to demonstrate that the evidence might not be truthful. But when I review all of the evidence as a whole, it is clear to me that notwithstanding certain differences between Officer Littlejohn and Officer Soto, for the most part, all of the evidence is

consistent, and the one thing that was not controverted, and that to me was important, is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted, and the court is going to accept the testimony of Officer Soto.

I was indeed concerned primarily with the manner in which he responded to a question more more so than his response to that question. But I do believe that the government has demonstrated through the evidence presented that the police [139] conduct was appropriate and, therefore, there is no basis to suppress the evidence. And it is so ordered. The motions to suppress will be denied.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 13, 1995 Decided May 12, 1995

No. 94-3012

UNITED STATES OF AMERICA,
APPELLEE

v.

MICHAEL A. WHREN,
APPELLANT

---

and consolidated case No. 94-3017

Appeals from the United States District Court
for the District of Columbia
93-cr00274
93-cr00274-02

Before BUCKLEY, WILLIAMS, and SENTELLE, *Circuit Judges:*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge:* Appellants Michael Whren and James Lester Brown challenge their convictions for federal drug offenses, asserting, among other things, that the District Court erred in denying their motions to suppress physical evidence. Appellants contend that police officers obtained evidence as a result of an illegal search and seizure in violation of appellants' Fourth Amendment rights. Appellants also challenge their convictions and sentences for possession with intent to distribute cocaine base under 21 U.S.C. § 841 (1988), arguing that

section 841 is a lesser-included offense of their separate convictions for possession with intent to distribute cocaine base within 1000 feet of a school under 21 U.S.C. § 860(a) (1988). While we reject appellants' Fourth Amendment challenges and otherwise affirm appellants' convictions, we remand for resentencing pursuant to the parties' agreement that section 841 is a lesser-included offense of a section 860(a) offense.

I. BACKGROUND

On July 8, 1993, a federal grand jury returned a four-count indictment against appellants Michael Whren and James Lester Brown, charging appellants with (1) possession with intent to distribute 50 grams or more of cocaine base, or crack, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii) (Count One); (2) possession with intent to distribute cocaine base within 1000 feet of a school in violation of 21 U.S.C. § 860(a) (Count Two); (3) possession of a controlled substance (marijuana) in violation of 21 U.S.C. § 844(a) (Count Three); and (4) possession of a controlled substance (phencyclidine ("PCP")) in violation of 21 U.S.C. § 844(a) (Count Four). Following a pre-trial suppression hearing to consider appellants' claim that evidence was seized as a result of a police stop and seizure which violated appellants' Fourth Amendment rights, the District Court denied appellants' motions to suppress physical evidence. After a subsequent jury trial, the jury found appellants guilty on all four counts.

A. *The Suppression Hearing*

The District Court heard extensive evidence in considering appellants' Fourth Amendment claim. The government presented as witnesses the arresting officers, who testified about the events surrounding appellants' arrest. On the evening of June 10, 1993, District of Columbia police officers Efrain Soto, Jr., Homer Littlejohn and several other plainclothes vice officers were patrolling for drug activity in the area of Minnesota Avenue and Ely Place, in Southeast Washington, in two unmarked cars. Officers Soto and Littlejohn were in a car driven by another officer, Investigator Tony Howard.

Soto testified that as the officers turned left off of 37th Place onto Ely Place heading north, he noticed a dark colored Nissan Pathfinder with temporary tags at the stop sign on 37th Place. Soto observed the driver, later identified as Brown, looking down into the lap of the passenger, Whren. Soto testified that at least one car was stopped behind the Pathfinder. As the officers proceeded slowly onto 37th Place, Soto continued to watch the Pathfinder, which Soto testified remained stopped at the intersection for more than twenty seconds obstructing traffic behind it. Investigator Howard had already begun to make a U-turn to tail the Pathfinder when Soto instructed him to follow it. As the officers turned to tail the vehicle, appellants turned west onto Ely Place without signalling and, as Soto testified, "sped off quickly." Soto further testified that the Pathfinder proceeded at an "unreasonable speed."

The officers followed the Pathfinder onto Ely Place, until it stopped at the intersection of Ely Place and Minnesota Avenue, surrounded by several cars in front of it, two behind it, and several to its right. The officers pulled into the eastbound lane of traffic parallel to the Pathfinder on the driver's side. Officer Soto then immediately exited his vehicle and approached the driver's side of the Pathfinder, identifying himself as a police officer. Officer Littlejohn followed a few steps behind and to the right of Soto.

After noticing that appellants could not pull over because of parked cars to their right, Soto told appellant Brown to put the Pathfinder in park. As he was speaking, Soto noticed that appellant Whren was holding a large clear plastic bag of what the officer suspected to be cocaine base in each hand. Soto yelled "C.S.A." to notify the other officers that he had observed a Controlled Substances Act violation. He testified that, as he reached for the driver's side door, he heard Whren yell "pull off, pull off," and observed Whren pull the cover off of a power window control panel in the passenger door and put one of the large bags into the hidden compartment therein. Soto opened the door, dove across Brown and grabbed the other bag from Whren's left hand. Officer Littlejohn pinned Brown to the back of the driver's seat so that he could not move.

Multiple officers then placed appellants under arrest and searched the Pathfinder at the scene. The officers recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks and a large white rock of crack cocaine from the hidden compartment on the

passenger side door, numerous unused ziplock bags, a portable phone and personal papers.

Defense attorneys pressed the arresting officers on their reasons for making the stop. Soto stated that the driver of the vehicle was "not paying full time and attention to his driving." Soto testified that he did not intend to issue a ticket to the driver for stopping too long at the stop sign, but he wished to stop the Pathfinder to inquire why it was obstructing traffic and why it sped off without signalling in a school area. He testified that the decision to stop the Pathfinder was not based upon the "racial profile" of the appellants, but rather on the actions of the driver. Officer Littlejohn's testimony differed only slightly from Soto's with respect to the hand from which Soto seized the drugs, but otherwise confirmed Soto's account.

B. *The District Court's Suppression Ruling*

After hearing the evidence and appellants' argument that the traffic stop was pretextual and thus violated the Fourth Amendment, the District Court denied appellants' motions to suppress the physical evidence. Although the court noted some minor discrepancies between testimony by Littlejohn and Soto, it noted that

> the one thing that was not controverted . . . is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted, and the court is going to accept the testimony of Officer Soto.

The court thus concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence."

C. *The Convictions and the Appeal*

Following the court's pre-trial suppression ruling, trial proceeded, and appellants were convicted on all four counts. On January 26, 1994, appellant Whren was sentenced to 168 months incarceration and five years supervised release on count one, 168 months incarceration and ten years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four. All terms were to be served concurrently. Whren was also assessed a fine of $8,800 on each count, all fines to be concurrent with count two, and a special assessment of $150. On February 9, 1994, appellant Brown was sentenced to 168 months incarceration and ten years supervised release on count one, 168 months incarceration and five years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four, all terms to be served concurrently, and a $150 special assessment.

Whren and Brown appeal their convictions and sentences, raising several challenges. Although we have accorded each alleged error full consideration, we believe

several do not merit separate discussion. For those challenges to appellants' convictions not discussed specifically herein, we reject appellants' arguments. We thus turn our attention to the two arguments we believe merit separate discussion: (1) that the District Court erred in denying their motions for suppression of physical evidence under the Fourth Amendment; and (2) that count one of appellants' indictment is a lesser-included offense of count two.

II. DISCUSSION

Appellants contend that the District Court erred in denying their motions to suppress physical evidence seized as a result of the traffic stop on June 10, 1993. They argue that the police officers used the alleged traffic violations as a pretext for what in actuality was a search for drugs without probable cause; thus, the search was objectively unreasonable under the Fourth Amendment. Although appellants recognize that this circuit has faced similar circumstances in *United States v. Mitchell*, 951 F.2d 1291 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1976 (1992), they contend that *Mitchell* did not adopt a standard with sufficient specificity to govern this case. Appellants assert that *Mitchell* merely requires a court to "look to objective circumstances . . . rather than an officer's state of mind," in determining the legitimacy of police conduct. *Mitchell*, 951 F.2d at 1295. Here, they contend that the objective circumstances did not justify the stop.

Appellants argue that this court should borrow from the law of other circuits in determining whether "objective circumstances" warrant a search. While several circuits hold that an alleged pretextual stop is valid as long as an officer legally "could have" stopped the car in question because of a suspected traffic violation, *see, e.g., United States v. Scopo*, 19 F.3d 777, 782-84 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994); *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994), appellants urge the court to adopt the test laid out by the Tenth and Eleventh Circuits, which have held that a stop is valid only if "under the same circumstances a reasonable officer *would have* made the stop in the absence of the invalid purpose." *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986) (emphasis added); *see United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988). Appellants contend that the "would have" test is superior to the "could have" test because the latter fails to place any reasonable limitations on discretionary police conduct, thus "cut[ting] at the heart of the Fourth Amendment." Brief of Appellant Whren at 22.

Finally, appellants assert that the District Court erred in convicting them for violation of 21 U.S.C. § 841 as well as 21 U.S.C. § 860(a), because the former is a lesser-included offense of the latter.

A. *The Traffic Stop and Search.*

The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

U.S. CONST. amend. IV. The Amendment imposes "a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). Because an ordinary traffic stop constitutes a limited seizure within the meaning of the Fourth Amendment, *Prouse*, 440 U.S. at 653, such action must be justified by probable cause or, at least, reasonable suspicion of unlawful conduct, based upon specific and articulable facts. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). In the context of automobile stops and searches, a court "must look to objective circumstances in determining the legitimacy of police conduct under the Fourth Amendment." *Mitchell*, 951 F.2d at 1295.

In claiming that this court should adopt the "would have" test for determining whether objective circumstances exist to warrant an automobile stop and subsequent search, appellants argue that pretextual stops are objectively unreasonable because, under the same circumstances, an officer without ulterior purposes would not have stopped the offenders. However, "[e]ven if we agreed that the stop was a mere pretext for a search, that does not mean that a violation of the Fourth Amendment has occurred." *Mitchell*, 951 F.2d at 1295.

Mitchell provides strikingly similar facts to this case. In *Mitchell*, a D.C. police officer, Stone, observed the two defendants, Mitchell and Zollicoffer, drive at a "high rate of speed," stop suddenly, and turn sharply without signalling. *Id.* at 1293. Stone gave chase and pulled their car over after brief pursuit. When Stone went to the window of the car, he had not yet decided whether to issue a citation. As he returned to his car to run a check on the

driver, an assisting officer noticed Zollicoffer leaning forward in the passenger seat with his hands inside his coat, as if holding a weapon. The officer ordered the defendants out of the car, searched them, and found weapons on each. *Id.* at 1293-94. Mitchell and Zollicoffer moved to suppress tangible evidence recovered during the stop, but the trial court denied their motions to suppress. *Id.* at 1294.

Against appellants' arguments that the stop was an unlawful pretext to search, this court affirmed. *Id.* at 1299. We reasoned that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense is a minor one." *Id.* at 1295. Officer Stone had observed two of the violations observed by Officer Soto in this case: speeding and turning without a signal. *Id.* Like Officer Soto, Officer Stone had not yet decided whether to issue a citation, but we held that his indecision "does not vitiate the justification for the initial stop." *Id.* In applying the "objective circumstances" test, we noted that "[e]ven a relatively minor offense that would not of itself lead to an arrest can provide a basis for a stop for questioning and inspection of the driver's permit and registration." *Id.* (quoting *United States v. Montgomery*, 561 F.2d 875, 880 (D.C. Cir. 1977)). Presented with the fact that the officer had observed the traffic violations, the court concluded that "objective circumstances clearly justified stopping the car." *Id.*

In holding that a traffic stop is reasonable as long as the officer has observed traffic violations by the defendant, *Mitchell* implicitly adopts the standard embraced by

the majority of courts which have considered the "pretext" issue. That is, regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation. *See United States v. Scopo*, 19 F.3d at 784 ("[W]here the arresting officer had probable cause to believe that a traffic violation occurred or was occurring in the officer's presence, and was authorized by state or municipal law to effect a custodial arrest for the particular offense, the resulting arrest will not violate the fourth amendment."); *United States v. Hassan El*, 5 F.3d at 730 ("[W]hen an officer observes a traffic offense or other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment."); *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993) (in banc) ("[T]raffic stops based on probable cause, even if other motivations existed, are not illegal."), *cert. denied*, 115 S. Ct. 97 (1994).

We thus reject appellants' suggestion that we adopt the more open-ended "would have" standard of the Tenth and Eleventh Circuits. *See United States v. Smith*, 799 F.2d at 709 (11th Cir. 1986); *see also United States v. Guzman*, 864 F.2d at 1517 (10th Cir. 1988). The objective "could have" standard provides a more principled method of determining reasonableness for two primary reasons. First, it eliminates the necessity for the court's inquiring into an officer's subjective state of mind, in keeping with the Supreme Court's admonitions that Fourth Amendment

inquiries depend "on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985). At the same time, in response to appellants' legitimate concerns regarding police conduct, the "could have" test provides a principled limitation on abuse of power. Officers cannot make a traffic stop unless they have probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts – requirements which restrain police behavior. *Cf. Delaware v. Prouse*, 440 U.S. at 661.

Applied to the facts of this case, the objective test adopted in *Mitchell* suggests that Officers Soto and Littlejohn had sufficient grounds to stop appellants. The District Court credited the testimony of Soto, who observed three traffic violations when appellant failed to give "full time and attention" to his driving, *see* Title 18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4, turned without signalling, *see id.* at § 2204.3, and drove away at an unreasonable speed. That factual finding is not clearly erroneous. *See United States v. Taylor*, 997 F.2d 1551, 1553 (D.C. Cir. 1993) (district court's findings of fact reviewed for clear error). Having seen those violations, Soto had the articulable and specific facts necessary to establish probable cause to stop appellants. *See Mitchell*, 951 F.2d at 1295; *Hassan El*, 5 F.3d at 729-30; *Scopo*, 19 F.3d at 781. Our inquiry goes no further.

We wish to make one point clear in applying the *Mitchell* standard. The *Mitchell* test ensures that the validity of the traffic stop "is not subject to the vagaries of

police departments' policies and procedures." *Ferguson*, 8 F.3d at 392. That is, whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop. *See Hassan El*, 5 F.3d at 730 (rejecting defendant's argument that stop was unreasonable because particular arresting officers were plainclothes officers assigned to narcotics duty, not traffic duty). In this instance, it is of no moment that Soto and Littlejohn were vice officers patrolling for drug violations rather than traffic police. When they observed a traffic violation, they, as officers of the law, were constitutionally justified in stopping appellants.

Accordingly, we reject appellants' Fourth Amendment arguments. Because appellants challenge only the stop and not the subsequent search of the Pathfinder, we need inquire no further. We conclude that the District Court properly denied appellants' motions to suppress.

B. *The Lesser-Included Offense.*

Appellants contend that their convictions for violation of 21 U.S.C. § 841(a)(1), which proscribes possession with intent to distribute controlled substances, including cocaine base, should be vacated because that section describes a lesser-included offense of 21 U.S.C. § 860(a), which proscribes possession with intent to distribute a controlled substance within one thousand feet of a school. Appellants rely on *United States v. Williams*, 782 F. Supp. 7, 8-9 (D.D.C. 1992), *aff'd without opinion*, 6 F.3d 829 (D.C. Cir. 1993), in which the District Court concluded that section 841 offenses were, in fact, lesser included

offenses of section 860(a) offenses. The government agrees with appellants' argument. Consequently, pursuant to the agreement of the parties, we will remand to the District Court for entry of an amended judgment and resentencing on Counts One and Two.

III. CONCLUSION

United States v. Mitchell dictates that police conduct in this case was reasonable. When a police officer observes a traffic violation, his subsequent stop of the vehicle is reasonable because it is supported by probable cause. We thus reject appellants' Fourth Amendment arguments, as well as all claims not discussed specifically herein. We remand, however, for entry of an amendment judgment and resentencing only with respect to Part II.B. above.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America
v.
Michael A. Whren,
Appellant

September Term, 1994
USDC Crim. No. 93-0274

[stamped filed July 13, 1995]

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and Consolidated Case No. 94-3017

BEFORE: Buckley, Williams, and Sentelle, Circuit Judges

ORDER

Upon consideration of Appellants' Joint Petition for Rehearing, filed June 26, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 95-5841

Michael A. Whren and James L. Brown,
Petitioners
v.
United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 15, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

January 5, 1996

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(6)

No. 95-5841

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a pretextual traffic stop undertaken by plainclothes vice officers who were prohibited by police department regulations from making routine traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances would have made such a stop.

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The opinion of the court of appeals (J.A. 6-19) is reported at 53 F.3d 371 (CADC 1995). The district court's oral ruling (J.A. 4-5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. The court of appeals denied petitioners' timely petition for rehearing on July 13, 1995 (J.A. 20). The petition for a writ of certiorari was filed on August 31, 1995. Certiorari was granted on January 5, 1996 (J.A. 21). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

REGULATION INVOLVED

Also at issue is District of Columbia Metropolitan Police Department General Order 303.1 (Traffic Enforcement) (effective April 30, 1992), which provides, in part (emphasis in original):

A. Objectives and Policies.

> This department's traffic enforcement policies and objectives are as follows:
>
> * * *
>
> 2. Policies.
>
> a. Traffic enforcement action may be taken under the following circumstances:

(1) By on duty uniformed members driving marked departmental vehicles; or

(2) By off duty uniformed members driving marked departmental vehicles while participating in the department's take home cruiser program; or

(3) By on duty uniformed members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch operating unmarked departmental vehicles; or

(4) Members who are not in uniform or are in unmarked vehicles may take enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.[1]

The full text of the General Order on Traffic Enforcement is reprinted as an addendum to this brief.

STATEMENT OF THE CASE

This case arose because the sight of two young black men in a Nissan Pathfinder with temporary tags, pausing at a stop sign in Southeast Washington, D.C., aroused the suspicion of plainclothes

[1] In the court of appeals and in the petition for writ of certiorari, petitioners cited the predecessor to this regulation:

> Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

General Order 303.1(I)(A)(2)(a) (effective July 29, 1986). With the exception of the take-home cruiser provision and the emphasis added to the "immediate threat" language, the substance of the reorganized regulation quoted in the text is identical to that relied upon below.

vice officers patrolling for narcotics violations in an unmarked car. The officers decided to stop the Pathfinder and "investigate" why the driver was stopped so long at the stop sign -- ostensibly a violation of the District of Columbia Municipal Regulation requiring drivers to pay "full time and attention" to operating their vehicle. 18 D.C.M.R. § 2213.4 (1995). Turning around to make the stop, one of the officers claimed to see the Pathfinder commit two other minor traffic infractions. Without any intention of issuing a ticket, and in violation of police regulations, the officers then seized the Pathfinder at a stoplight a few blocks away and discovered illegal drugs in plain view.

On July 8, 1993, a federal grand jury indicted the two men, petitioners Michael A. Whren and James L. Brown, on charges of possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii), possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860(a), possession of marijuana in violation of 21 U.S.C. § 844(a), and possession of phencyclidine in violation of 21 U.S.C. § 844(a) (J.A. 7).

A. The Suppression Hearing

On October 20, 1993, the district court (Hon. Norma Holloway Johnson) held an evidentiary hearing on the defendants' motions to suppress all evidence seized as a result of the stop of the Pathfinder (Tr. 8-139).[2] The government called two witnesses. The

[2] "Tr." refers to pages of the sequentially numbered transcripts of the suppression hearing (Tr. 1-142) and trial proceedings (Tr. 143-787).

first, Officer Efrain Soto, Jr., described the circumstances leading to the stop of the Pathfinder, the sighting of the drugs, and the arrests (Tr. 8-79). The government limited the testimony of its second witness, Officer Homer Littlejohn, to events after the stop of the Pathfinder (Tr. 81-104). The district court ruled that defense counsel's questions about events leading to the stop were beyond the scope of Officer Littlejohn's direct testimony (Tr. 88-89). The defense then called Officer Littlejohn as its own witness concerning the circumstances surrounding the stop (Tr. 106-120). The evidence at the suppression hearing was as follows:

1. The Decision To Stop the Pathfinder

On June 10, 1993, at 8:25 p.m., Officers Soto and Littlejohn and two or three other plainclothes[3] vice officers were patrolling a "high drug area" (Tr. 117) in an unmarked car (J.A. 8; Tr. 10). The objective of the officers, along with several officers in a second unmarked car with whom they were working (Tr. 10, 61-62), was to "find narcotics activity going on" (J.A. 8; Tr. 22).

As the officers' car turned left off of Ely Place onto 37th Place heading north,[4] Officers Soto and Littlejohn noticed a Nissan Pathfinder with temporary tags at the stop sign where 37th Place ends at a "T"-intersection with Ely Place (J.A. 8; Tr. 11, 26-27).

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[3] Officer Soto testified that he was wearing his badge on a chain around his neck and an orange arm band (Tr. 14). This attire was consistent with the police regulation governing "casual clothes units." See MPD General Order 308.13(I)(B)(2) & (3) (revised effective December 5, 1986).

[4] The D.C. Circuit's opinion reverses the street references (J.A. 8).

The officers testified that the two occupants were looking down at their laps (J.A. 8; Tr. 11, 113) and that the driver was "not paying full time and attention" to his driving (J.A. 10; Tr. 17, 51, 72). Officer Soto testified that there was at least one car behind the Pathfinder (J.A. 8; Tr. 11, 33, 61) but acknowledged that the driver of that car did not honk or otherwise request the Pathfinder to move (Tr. 61). Officer Littlejohn testified that there were no vehicles waiting behind the Pathfinder (Tr. 114, 115).

As the unmarked car completed its left turn and headed up 37th Place, Officers Soto and Littlejohn continued to watch the Pathfinder (J.A. 8; Tr. 30-31, 34, 112-114). According to Officer Soto, the Pathfinder was at the stop sign for a total of more than twenty seconds (J.A. 8; Tr. 52).[5] At that point, Officer Soto decided to "investigate" -- to inquire of the driver "why did he stay at the stop sign for so long length of a time" (Tr. 11, 17, 50-51, 65). The driver of the unmarked car was already making a U-turn approximately a quarter of a block up 37th Place when Officer Soto asked him to turn the car around and get behind the Pathfinder (J.A. 8; Tr. 11, 54).

2. The Alleged Failure To Signal and Unreasonable Speed Violations

Officer Soto testified that as the unmarked car was making the U-turn, the Pathfinder "sped off quickly, made a right turn [onto

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[5] Officer Soto was impeached with his testimony at the preliminary hearing that "I don't even know how long they were stopped there" (Tr. 60). Officer Littlejohn never gave a time estimate.

Ely Place] towards Minnesota Avenue" (J.A. 8; Tr. 11).

> Q Let me ask you, when the Pathfinder turned right, did you see if it used a signal?
>
> A It used no hand or mechanical turn signals at all that I can remember it using. And it also -- when I said sped, it sped quickly towards Minnesota Avenue.
>
> Q Was it conforming with the speed limit in that area, if you know?
>
> A It was my opinion it was unreasonable speed.

J.A. 8; Tr. 11-12.[6] At that time it was Officer Soto's intention to pull the Pathfinder over not only to ask the driver why he was stopped so long at the stop sign but also ask him why he was speeding and "simply to warn him" (J.A. 10; Tr. 72-73).[7] Although police department regulations generally prohibit oral "warnings" (even by officers authorized to make a traffic stop),[8] Officer Soto

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[6] Officer Soto was impeached with his failure to mention not signalling when asked at the preliminary hearing to describe any traffic violations committed by the Pathfinder (Tr. 63-64). Nor was the alleged failure to signal mentioned in the police report on events leading to the stop (Tr. 64-65). Although other officers testified at trial that the Pathfinder was speeding (Tr. 345, 383, 492), Officer Littlejohn never claimed to see either a failure to signal or a speed violation.

[7] Officer Littlejohn, by contrast, did not attempt to justify the stop as a traffic stop. Rather, he claimed to have "reasonable suspicion" (Tr. 116-117):

> [Defense Counsel]: And the reasonable suspicion was that there were drugs; is that correct?
> . . .
> [Littlejohn]: Sir, they were leaving a high drug area. We did not know they had drugs in that vehicle at that time, just had a reasonable suspicion as to their actions as to why they were stopped at the stop sign for so long.

[8] MPD General Order 303.1(I)(A)(2)(b) provides:

> In each instance of a stop for a traffic violation, the member shall:
>
> (1) Issue either a Notice of Infraction (NOI); or
> (2) Issue a Warning NOI; or
> (3) Under extreme circumstances an oral warning may be given (e.g., receipt of a radio assignment requiring immediate response, or the motorist was enroute to a hospital for emergency treatment of a sick or injured passenger).

testified that he did not intend to issue the driver any ticket but simply wanted to "talk to" the driver about the violations (id.):

> The only circumstances that I would issue tickets -- I'm a vice investigator; I'm not out there to give tickets -- is for just reckless, reckless driving, something that in my personal view would somehow endanger the safety of anybody who's walking around the street or even the occupants of a vehicle, maybe children or whoever. . . . I wasn't going to issue a ticket to him at all. That was not my intention at all. My intentions was to pull him over and talk to him [about the full time and attention and speed violations].

Officer Soto's testimony confirmed that he was deviating from standard practice in stopping the Pathfinder at all. He acknowledged that, as a vice officer, he is "out there almost strictly to do drug investigations" and that he pulls people over for making traffic violations "[n]ot very often at all" (Tr. 78).

3. The Seizure of the Pathfinder

The officers caught up to the Pathfinder as it was stopped at the red light at Minnesota Avenue (J.A. 9; Tr. 12). At the stoplight, the Pathfinder was surrounded by several cars in front of it, two cars behind it, and several cars alongside it to the right (J.A. 9; Tr. 11-12, 18-19, 35-36). The unmarked car pulled up parallel to the driver's side of the Pathfinder, facing into and obstructing oncoming eastbound traffic, and pinning the Pathfinder in on all sides (J.A. 9; Tr. 13, 35-38).

4. The Arrests of the Defendants and Seizure of the Drugs

Officer Soto immediately walked towards the driver's side of the Pathfinder, identifying himself as a police officer and ordering the driver to pull over to the right (J.A. 9; Tr. 13-14). Realizing as he reached the Pathfinder that it had nowhere to go on the right, Officer Soto ordered the driver to put the car in park (J.A. 9; Tr. 13). As he was speaking, Officer Soto looked through the driver's window and saw the passenger, Mr. Whren, holding a clear plastic bag of what appeared to be cocaine base in each hand, one bag by his right knee and one bag by his left knee (J.A. 9; Tr. 13-15, 42-43). Officer Littlejohn, who was standing right next to Officer Soto and had the same "vantage point" (Tr. 83, 89-90, 97), testified that Mr. Whren was holding only one bag of cocaine, which he was "displaying" to Mr. Brown with his right hand while his left hand rested on his lap (Tr. 83, 92-94, 98-99, 102-103).

Officer Soto yelled "C.S.A." to alert the other officers that he had seen a Controlled Substances Act violation (J.A. 9; Tr. 74-75). As he reached for the driver's door, he heard the passenger tell the driver to "pull off, pull off" and saw the passenger pull the cover off a panel on the passenger door and put the plastic bag he had in his right hand inside a hidden compartment (J.A. 9; Tr. 14-15). Officer Soto testified that he then opened the door, "dove" across Mr. Brown, and grabbed the other plastic bag from Mr. Whren's left hand (J.A. 9; Tr. 15, 43-45).[9] Officer Littlejohn

[9] Officer Littlejohn said he saw Officer Soto seize the bag from Mr. Whren's right hand (Tr. 94-95).

pinned Brown against the driver's seat (J.A. 9; Tr. 101). "[M]ultiple" officers came to their assistance (J.A. 9; Tr. 15, 45),[10] and Mr. Whren and Mr. Brown were placed under arrest (J.A. 9; Tr. 15, 84). The officers searched the Pathfinder, finding a plastic bag of cocaine base and a loose rock of cocaine base in the compartment in the passenger door and two tinfoils of marijuana laced with PCP on the console between the seats (J.A. 9-10; Tr. 16, 84-86).

5. The District Court's Ruling

Judge Johnson denied the motion to suppress (J.A. 4-5):

> Now, it is absolutely true, anyone who has heard the testimony here today knows that not every item of evidence was indeed consistent. There were differences indicated and there were efforts made to demonstrate that the evidence might not be truthful. But when I review all of the evidence as a whole, it is clear to me that notwithstanding certain differences between Officer Littlejohn and Officer Soto, for the most part, all of the evidence is consistent, and the one thing that was not controverted, and that to me was important, is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted and the Court is going to accept the testimony of Officer Soto.
>
> I was indeed concerned primarily with the manner in which he responded to a question more more so than his response to that question.[11] But I do believe that the

[10] The trial record indicates there were nine or ten officers in the two unmarked cars (Tr. 279, 287, 486-487).

[11] The court had been concerned by the "lengthy pause" before Officer Soto answered "no" to the following question from Mr. Brown's counsel (Tr. 66-67):

> government has demonstrated through the evidence presented that the police conduct was appropriate and therefore, there is no basis to suppress the evidence. And it is so ordered. The motions to suppress will be denied.

B. The Trial And Sentences

Mr. Whren's and Mr. Brown's trial began the next day (J.A. 2).[12] On October 28, 1993, the jury found the defendants guilty on all counts (J.A. 2, 11). On January 26, 1994, Mr. Whren was sentenced to 168 months in prison, a term of supervised release, and a fine of $8800 (J.A. 11). On February 9, 1994, Mr. Brown was sentenced to 168 months in prison and a term of supervised release (J.A. 11).

C. The D.C. Circuit's Decision

The D.C. Circuit affirmed the denial of the motions to suppress. The court of appeals explicitly rejected the contention that a stop justified on the basis of traffic violations is reasonable "only if 'under the same circumstances a reasonable officer would have made the stop'" absent another purpose. J.A. 13

> Q . . . [I]sn't it true that your decision to stop that Pathfinder was because you believed that two young black men in a Pathfinder with temporary tags were suspicious; isn't that true?

When the court asked Officer Soto why he had "hestitate[d] a long time" before answering that "very straightforward question," Soto stated that he had "wanted to really think" and "analyze the question" (Tr. 75-76). He denied basing the stop on any "racial profile" (Tr. 76-77).

[12] There was more testimony at trial about the stop. Mr. Whren renewed his motion to suppress at the close of the government's case, but the court, calling the trial testimony "additional evidence but not new evidence," declined to revisit the issue (Tr. 439-41).

(quoting United States v. Smith, 799 F.2d 704, 709 (CA11 1986) (emphasis added by D.C. Circuit)). Instead, the court adopted the so-called "could have" test for allegedly pretextual traffic stops: "[A] traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation." J.A. 16 (emphasis in original). The court concluded that a traffic stop is always "reasonable" if an officer believes he has observed a traffic violation: "When a police officer observes a traffic violation, his subsequent stop of the vehicle is reasonable because it is supported by probable cause." J.A. 19.[13] The court therefore ruled the stop in this case justified based on three civil traffic infractions described in Officer Soto's testimony: Mr. Brown failed to give "full time and attention" to his driving (18 D.C.M.R. § 2213.4), turned without signalling (id. at § 2204.3), and drove away at an "unreasonable"

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[13] Eight other circuits have adopted some form of the "could have" test. See United States v. Botero-Ospina, 71 F.3d 783, 787 (CA10 1995) (en banc); United States v. Johnson, 63 F.3d 242, 247 (CA3 1995), petition for cert. filed, No. 95-6724 (Nov. 13, 1995); United States v. Scopo, 19 F.3d 777, 782-84 (CA2), cert. denied, 115 S. Ct. 207 (1994); United States v. Ferguson, 8 F.3d 385, 389-91 (CA3 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Hassan El, 5 F.3d 726, 729-30 (CA4 1993), cert. denied, 114 S. Ct. 1374 (1994); United States v. Cummins, 920 F.2d 498, 500-01 (CA8 1990), cert. denied, 502 U.S. 962 (1991); United States v. Trigg, 878 F.2d 1037, 1039 (CA7 1989), cert. denied, 502 U.S. 962 (1991); United States v. Causey, 834 F.2d 1179 (CA5 1987) (en banc).

The Ninth and Eleventh Circuits apply the "would have" test. United States v. Cannon, 29 F.3d 472, 475-76 (CA9 1994); United States v. Smith, 799 F.2d 704, 709 (CA11 1986). See also, e.g., Alejandre v. State, 903 P.2d 794, 796-97 (Nev. 1995); State v. Daniel, No. 84486, 1995 WL 568723, *1-*4 (Sept. 28, 1995); State v. Izzo, 623 A.2d 1277, 1280 (Me. 1993).

speed (id. at § 2200.3). J.A. 17.

The defendants had argued that the stop was unreasonable in that it was made by plainclothes vice officers in an unmarked car in violation of police regulations. But the court of appeals found it irrelevant that the officers who made the stop were plainclothes vice officers patrolling for narcotics violations, rejecting any standard that would make traffic stops "'subject to the vagaries of police departments' policies and procedures.'" J.A. 17-18 (quoting United States v. Ferguson, 8 F.3d 385, 392 (CA6 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994)). "When they observed a traffic violation, they, as officers of the law, were constitutionally justified in stopping [the defendants]." J.A. 18.[14]

SUMMARY OF ARGUMENT

The Fourth Amendment forbids "unreasonable" seizures. In adopting the "could have" test, the court of appeals held that even a pretextual traffic stop is per se reasonable whenever a police officer has probable cause of any traffic violation, no matter how minor, and no matter how far the stop deviates from standard police practice. This rule ignores the "essential purpose" of the Fourth Amendment's "reasonableness" requirement: "'"to safeguard the privacy and security of individuals against arbitrary invasions . . ."'" Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (citations omitted).

Given the ease with which an officer so inclined can identify technical traffic infractions, merely limiting stops to those circumstances in which the police can say they have witnessed such a violation is, as a practical matter, no limitation at all. A string hanging from the rearview mirror, a tire touching the shoulder stripe, a lane change signal a moment too brief, or a pause at a stop sign to look at a map, are all unquestionable grounds for seizure under the "could have" test. In reality, the universe of persons subject to seizure under the D.C. Circuit's rule is the same universe of persons subject to seizure for spot license checks in Prouse -- all motorists. In Prouse, this Court rejected such unfettered discretion even where the state considered its spot-check program necessary to the promotion of traffic safety. The D.C. Circuit's rule allows such discretion in circumstances where -- measured by the established practices of the police themselves -- the intrusion is completely unnecessary to promote traffic safety. Indeed, the stop upheld in this case affirmatively violated police traffic safety regulations.

If any civil traffic infraction always will justify any stop of any driver, no matter how far removed the stop is from standard police practice, such infractions are subject to abuse by officers looking for a pretext to evade otherwise applicable Fourth Amendment limits. In fact, under the "could have" test, such use of the traffic laws is not an "abuse" at all; it is just part of

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[14] The court remanded for resentencing because the convictions for possession with intent to distribute were lesser-included offenses of the convictions for possession with intent to distribute within 1,000 feet of a school (J.A. 18-19). On remand, the district court vacated the lesser-included convictions and reimposed the original sentences on the remaining counts (except that Mr. Whren was sentenced to no fine) (J.A. 2). Consolidated appeals of the resentencings are being held in abeyance pending this Court's decision.

the game. Unfortunately, all the evidence indicates that not everyone gets the same odds. Data from pretextual traffic enforcement programs shows, for example, that the individuals singled out for arbitrary enforcement on the basis of inarticulable hunches of some greater crime are disproportionately minorities. Not surprisingly, the "hit" rate for stops based on less than reasonable suspicion is extremely low, meaning that thousands of innocent motorists may be arbitrarily stopped based on the color of their skin or other improper criteria.

To be sure, subjective motive is not controlling, and many pretextual traffic stops do not violate the Fourth Amendment. "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138 (1978). But it is one thing to say that a stop that a reasonable officer would have made on the objective basis asserted is not rendered unconstitutional merely because the officer who actually made the stop had an additional, or even an entirely different, subjective motivation. It is quite another to say that "the circumstances, viewed objectively, justify [the] action" where, as here, no reasonable officer in those circumstances would have taken that action on the objective basis asserted. The "could have" test puts the Fourth Amendment stamp of approval on all pretextual traffic stops. In contrast, the "would have" standard urged by

petitioners merely recognizes that there are some circumstances under which it is not objectively reasonable to stop a car for a trivial traffic violation. By judging police conduct by what would be expected of a "reasonable officer," this standard does no more than hold the police to the classic Fourth Amendment test of reasonableness.

To endorse unlimited discretion in enforcement of civil traffic laws, even to the extent of upholding traffic stops that the police department's own regulations affirmatively forbid, would be to endorse an entirely sham system of "traffic enforcement." The D.C. Circuit's ruling encourages the police to use arbitrary enforcement of the civil traffic laws as a law enforcement strategy by rewarding the police with convictions for criminal violations on the few occasions when their unsupported hunches produce a "hit," while innocent motorists pay the price of all the officers' arbitrary "misses." Such a system only breeds public cynicism and disrespect for the police. The Fourth Amendment entitles citizens to expect their police to act "reasonably." That standard was not met here.

ARGUMENT

I. BY ALLOWING MERE OBSERVATION OF ANY TECHNICAL TRAFFIC "VIOLATION" TO JUSTIFY ANY PRETEXTUAL TRAFFIC STOP, THE D.C. CIRCUIT'S RULE FAILS TO PREVENT ARBITRARY AND UNREASONABLE SEIZURES.

A. The Essential Purpose of the Fourth Amendment Is to Safeguard Our Privacy Against Arbitrary Invasions.

"The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is

basic to a free society . . . " Wolf v. Colorado, 338 U.S. 25, 27 (1949). Indeed, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order '"to safeguard the privacy and security of individuals against arbitrary invasions . . . . "'" Delaware v. Prouse, 440 U.S. 648, 653-54 (1979), quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978), quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

According to the D.C. Circuit, a vehicle stop is "reasonable" whenever it is "supported by probable cause" to believe a traffic violation has occurred (J.A. 19). But the observation of a traffic violation does not automatically end the reasonableness inquiry. After all, the requisite degree of objective individualized suspicion (whether probable cause or a less stringent standard) is only the "minimum" that "the reasonableness standard usually requires." Prouse, 440 U.S. at 654 (emphasis added).

This Court has often looked beyond the mere existence of probable cause in evaluating the reasonableness of searches and seizures. In Wilson v. Arkansas, 115 S. Ct. 1914 (1995), for instance, the Court held that an officer's unannounced entry into a home may be unreasonable under the Fourth Amendment even when the police have probable cause and a warrant. Tennessee v. Garner, 471 U.S. 1 (1985), held that the use of deadly force to effect a seizure for a nonviolent crime was unreasonable even though there was probable cause for an arrest. Similarly, in Winston v. Lee,

470 U.S. 753 (1985), the Court held that even though there was probable cause, a search for a bullet lodged in a suspect's body was unreasonable based on a weighing of the intrusion against the government's need for the evidence.[15] Finally, Welsh v. Wisconsin, 466 U.S. 740, 754 (1984), holds that even where there is probable cause (and even where evidence would be lost by waiting to obtain a warrant) a warrantless entry into a suspect's home to make an arrest for a civil traffic offense is "unreasonable police behavior."

Given the exceedingly broad discretion provided the police by the existence of hundreds of minor traffic regulations, "reasonableness" in this context requires more than the "minimum" of individualized suspicion of a "violation." The Fourth Amendment serves a "discretion control function" independent of its interest-balancing role: "Even when the governmental interest at stake might otherwise justify a search or seizure, that search or seizure may be illegal if allowing it would confer too broad a discretionary authority on the police." William J. Mertens, The Fourth Amendment and the Control of Police Discretion, 17 J. L. Ref. 551, 553 (1984). The Fourth Amendment is concerned not just with "unjustified" seizures, but also with "arbitrary" seizures "conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to

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[15] See also Schmerber v. California, 384 U.S. 757 (1966) (notwithstanding probable cause and exigent circumstances to obtain blood sample, Court considered manner in which blood was extracted in determining reasonableness of search).

search and seize"; it "condemns the petty tyranny of unregulated rummagers." Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 411 (1974) (hereinafter "Amsterdam").

B. Because the Police Always Can Allege a Breach of a Minor Civil Traffic Regulation, Unrestrained Authority to Seize Motorists on that Basis Does Not Limit Police Discretion.

The court of appeals acknowledged petitioners' "legitimate concerns regarding police conduct" but concluded that the requirement that the police have probable cause of a traffic violation or reasonable suspicion of unlawful conduct before effecting a traffic stop properly "restrain[s] police behavior." J.A. 17. This protection is illusory. As a practical matter, the probable cause test applied by the D.C. Circuit, while simple, subjects motorists "to unfettered governmental intrusion every time [they] ente[r] an automobile." Prouse, 440 U.S. at 663.

Prouse definitively laid to rest the notion that officers were free to single out motorists on any basis whatsoever and stop them on the spot. But the "could have" test allows officers to single out the very same motorists, follow them until the officers catch them in violation of some subsection of the traffic code -- no matter how minor or seldom-enforced -- for which no reasonable officer in those circumstances would effect a stop, and then stop them.[16]

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[16] For example, in United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990), a local sheriff's department officer assigned to a DEA-funded drug task force, was travelling in an unmarked car on Interstate 70 when he observed a car with out-of-state plates. Consistent with his pattern of stopping out-of-state cars (188 out

> [G]iven the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [the requirement of a traffic violation] hardly matters, for . . . there exists 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

1 W. LaFave, Search and Seizure § 1.4(e) at 123 (3d ed. 1996), quoting 2 L. Wroth & H. Zobel, Legal Papers of John Adams 141-42 (1965). Because virtually "every man" can be caught in a minor traffic infraction, the decision below places "every man" at the risk of arbitrary seizure.

For example, recent data shows that almost half of all vehicles monitored were violating the 55 mile per hour speed limit (71% on urban interstates and 80% on rural interstates). U.S. Dept. of Transportation, National Maximum Speed Limit -- Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics at Tables 1 & 3 (Oct. 1995). These noncompliance rates are not surprising given the "traditional five mph enforcement 'tolerance' in most states." Id. at Table 1. See also H.R. Rep. No. 171(I), 102nd Cong., 1st Sess. 32 (1991), reprinted in 1992 U.S.C.C.A.N. 1526, 1558 ("the average motorist expects a 5 to 10 mile per hour tolerance by law enforcement personnel"). While the common practice of exceeding the posted limit (at least by one or two miles per hour) is not to be

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of 200 stops over a nine-month period), the officer followed the car and observed it gradually edge toward the right until the right front tire ultimately contacted the white shoulder stripe, at which point he pulled it over for "weaving." This stop, which was held invalid under the "would have" test, would easily have passed the "could have" test.

applauded, it is a reality that is not affected by sporadic and arbitrary stops of a handful of motorists. Cf. Prouse, 440 U.S. at 660 (doubting deterrence value of random license checks).

If speed monitors are able to catch almost half the population violating just one regulation, the universe of drivers subject to seizure in a world where the police have a one-inch thick book of traffic regulations with which to work must approach 100%. After all, one can also be stopped for driving too slowly, 18 D.C.M.R. § 2200.10, or even for driving precisely the speed limit if a police officer deems that speed "greater than is reasonable and prudent under the conditions" (id. at § 2200.3). And at any given moment, surely thousands of drivers in Utah are signalling for only two seconds, rather than the required three, before changing lanes. See Utah Code Ann. 41-6-69. Indeed, "driv[ing] in accordance with all traffic regulations" is apparently so unusual that some officers consider it suspicious and have attempted to use it as a factor in a "drug courier profile." See United States v. Smith, 799 F.2d 704, 707 (CA11 1986).

This case is a classic example of just how easy it is for police officers to find a "violation" of a civil traffic provision. The court of appeals concluded that one proper basis for this stop was Mr. Brown's violation of 18 D.C.M.R. § 2213.4, under which an operator "shall, when operating a vehicle, give full time and attention to the operation of the vehicle." J.A. 17.[17] Armed with

[17] In Ziegler v. District of Columbia, 71 A.2d 618 (D.C. 1950), the local appellate court rejected the argument that the regulation was improperly vague and ambiguous and interpreted its scope quite broadly (id. at 620):

> [W]e think the regulation is understandable and sufficiently definite to inform a motorist of the duties required by it. . . . The [regulation] . . . was directed at any diversion of the driver's attention. One's attention can be as easily diverted by something outside the car or by one's own thoughts as by a passenger or tangible object within the car.

the "full time and attention" regulation and the "could have" Fourth Amendment standard, an officer could stop any car, at any time, on any improper basis, simply by waiting for the driver to change the radio station, speak to a passenger, read a roadside billboard, glance at his watch, or pause briefly at a stop sign to look down at directions or consult a roadmap.[18] With traffic laws this subjective and nitpicking at police disposal, the probable cause standard alone is ineffective to limit police discretion.

Police are well aware of this reality. The American Bar Foundation's Survey of the Administration of Criminal Justice in the United States reported the following statements by police officers:

> You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.
>
> You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway.
>
> In the event that we see a suspicious automobile or

[18] In a different context, such strict enforcement of a "full time and attention" requirement might be perfectly reasonable. Cf. Guide For Counsel In Cases To Be Argued Before The Supreme Court Of The United States at 10 (October Term 1995) (defining the phrase "full time and attention" during oral argument as "not look[ing] down at your notes and . . . not look[ing] at your watch").

> occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.

L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 131 (1967).

C. Unlimited Discretion To Stop for Trivial Traffic Infractions Invites Police To Abuse That Discretion To Evade Fourth Amendment Constraints.

"The dangers of abuse of a particular power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance." Amsterdam, 58 Minn. L. Rev. at 435. The danger of abuse of minor traffic laws grows out of two characteristics of automobiles: 1) they are mobile; and 2) their use is regulated to the point that it is impossible to operate them in strict conformity with each and every applicable regulation. Unlike pedestrians, whom the police frequently approach and seek to interview consensually without a Fourth Amendment seizure, see, e.g., Florida v. Royer, 460 U.S. 491, 497 (1983), it is not physically possible (or at least not very safe) to drive alongside and request a consensual interview with a motorist inside a moving automobile. If an officer wants to "check out" a motorist for some reason short of reasonable suspicion of wrongdoing, he has a tremendous incentive to find a way to evade the bar the Fourth Amendment would otherwise impose to stopping the car. The combination of this temptation and the ease with which officers can identify civil traffic infractions creates the phenomenon of the pretextual traffic stop -- the use of traffic laws to evade constitutional restraints.

If police are not required to exercise their discretion within the confines of standard police procedure, the decision whether to stop a particular citizen for a particular minor traffic infraction will turn on no more than "the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin." Amsterdam, 58 Minn. L. Rev. at 416. The "poorly reasoned decisions" upholding stops without regard to whether they conform to reasonable police practice "have conferred upon the police virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason." 1 W. LaFave, Search and Seizure § 1.4(e) at 121-122 (3d ed. 1996). Even some circuit judges who have joined in the "could have" rule have recognized the inherent risk that "some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity -- factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, heavy jewelry, and flashy clothing." United States v. Scopo, 19 F.3d 777, 785-86 (CA2 1994) (Newman, C.J., concurring), cert. denied, 115 S. Ct. 207 (1994).[19]

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[19] Appendix A to the Brief for Respondent in Delaware v. Prouse, No. 77-1571, contains a wealth of social science research explaining "'the general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality, or occupation, and then to attribute to him the qualities believed to be typical of members of that group.'" Id. at 1a (citation omitted). "The conclusion reached by all of the relevant literature, in short, is that police officers' behavior will

There can be little doubt that this risk is real.

> As the old adage warns, the more things change, the more they remain the same. In Montgomery, Alabama, on January 26, 1956, police officers arrested and jailed Dr. Martin Luther King, Jr. for allegedly driving thirty miles per hour in a twenty-five mile per hour zone. [citation omitted] Today, everyone readily acknowledges the police officers stopped, arrested, jailed and harassed Dr. King because he was an African-American and because he actively and vigorously sought equal protection and equal treatment for African-Americans.

United States v. Harvey, 16 F.3d 109, 114 (CA6) (Keith, J., dissenting), cert. denied, 115 S. Ct. 258 (1994). Such practices are, unfortunately, still with us. In the Harvey case, for example, a police officer testified that he stopped the defendant's car in part because it fit his own personal drug trafficker profile: "There were three young black male occupants in an old vehicle." Similarly in State v. Arroyo, 796 P.2d 684, 688 (Utah 1990), the Utah Supreme Court cited a state trooper's admission that "[a]s a result [of] training at [a] seminar, . . . whenever he observed an Hispanic individual driving a vehicle he wanted to stop that vehicle" and that "once he stopped an Hispanic driver, 80% of the time he requested permission to search the vehicle."

Although courts generally see only the few "hits" that result from a policy of stopping vehicles based on a "hunch" of illegal activity plus a technical traffic violation, such a policy in fact results in the seizure of thousands of innocent motorists who, but

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reflect their biases when the officers are given free rein." Id. at 9a. One experiment, for example, involved having 15 college students with clean driving records affix "Black Panther" bumper stickers to their cars and go about their normal commuting patterns. In 17 days, they had accumulated 33 traffic citations. Id.

for the unreasonable suspicion of the officer, would never have been stopped. "What appears to be a police officer's magical 'sixth sense' in a criminal case arising from a successful interdiction is, in reality, the inevitable and often isolated positive result of a search that was based on nothing more than a hunch." David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, 1994 U. Chi. Legal F. 237, 248 (1994) (hereinafter "Rudovsky"). Justice Jackson's observation nearly a half-century ago is no less true today: "I am convinced that there are . . . many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Because police do not generally keep records of traffic stops that turn up nothing and in which no one is ticketed, it is no simple matter to substantiate Justice Jackson's suspicions. However, reporters from the Orlando Sentinel had the unique opportunity to document this phenomenon when they obtained 148 hours of videotaped "traffic" stops of 1,084 motorists along Interstate 95 in Florida. Brazil and Berry, Color of Driver is Key to Stops in I-95 Videos, Orlando Sentinel, Aug. 23, 1992, at A1. Although all of the stops were purportedly based on traffic violations,[20] only 9 drivers (less than one percent) were issued

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[20] Twenty-three percent of the stops were for alleged "swerving"; twenty-two percent were for "following too closely"; twelve percent were for speeding 1-10 mph over the limit; seven

citations. Searches were made in almost half the stops, but only five percent of all stops resulted in an arrest. Id.[21] Most shocking is how racially disproportionate the stops were. Although blacks and Hispanics made up only five percent of the drivers on that stretch of I-95 and only fifteen percent of traffic convictions statewide,[22] approximately seventy percent of those stopped were black or Hispanic. Id. On average, stops of minority drivers lasted more than twice as long as stops of white drivers. Id. For some, the tapes showed it was not the first time they had been singled out: "There is the bewildered black man who stands on the roadside trying to explain to the deputies that it is the seventh time he has been stopped. And the black man who shakes his head in frustration as his car is searched; it is the second time in minutes he has been stopped." Id. This kind of baseless "checking out" of racial minorities generally gets public attention

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percent were for having a burned out license tag light; and four percent were for failure to signal a lane change. Id.

[21] This low "hit" rate is consistent with other empirical data on the success rate of contacts based on less than reasonable articulable suspicion. See, e.g., Florida v. Bostick, 501 U.S. 429, 442 (1991) (Marshall, J., dissenting) (approaches during sweep of 100 buses in North Carolina resulted in only seven arrests) (citation omitted); United States v. Hooper, 935 F.2d 484, 500 (CA2) (Pratt, J., dissenting) (although two agents approached 600 persons in Buffalo airport in 1989 based on DEA drug courier profile, "their hunches that year resulted in only 10 arrests" -- a 98% "miss" rate), cert. denied, 502 U.S. 1015 (1991).

[22] Curtis, Statistics Show Pattern of Discrimination, Orlando Sentinel, Aug. 23, 1992, at A11.

only when someone well-known speaks out.[23]

Discovery materials in a class action involving pretextual traffic stops along Interstate 95 near Philadelphia show a similar pattern. The class representatives alleged that, while returning from a church celebration in 1991, they were stopped and subjected to a sniff by a police dog before being told, "[i]n order to make this a legitimate stop, I'm going to give you a warning for obstruction of your car's rear-view mirror." Wilson v. Tinicum Township, 1993 WL 280205 (E.D. Pa. July 20, 1993) (certifying class). The only object hanging from the mirror was a thin piece of string on which an air freshener had once been attached. When the driver pointed out that the officer could not have seen the string, the officer stated that they were stopped "because you are young, black and in a high drug-trafficking area, driving a nice car." Id. Discovery materials and follow-up interviews in the Tinicum Township case showed:

> First, the interdiction program is based on the power to make a pretextual traffic stop. Numerous vehicles have been stopped, for example, for having small items tied to their rearview mirrors, for outdated inspection stickers, or for other minor violations, all supposedly observed as the car passed the police at sixty miles per hour.

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[23] See Aldridge, A Team's True Colors, The Washington Post, Dec. 16, 1995, at A1 (quoting defensive tackle William Gaines on commuting between Redskin Park and suburban Virginia: "Being a black American, . . . [y]ou're more [likely] to see it than a white American would. Because I've been pulled over here a couple of times in my truck, doing the speed limit. Just riding on 66 or whatever. Once they pulled me over, though, they didn't give me any trouble. They checked to make sure it was my truck. . . . I guess because I had my truck fixed up, they thought maybe it was a drug thing or whatnot.")

> Second, the stops are racially disproportionate.[24] Third, claims of consent are rebutted by numerous innocent individuals who give consistent accounts of being told that they would have to wait for a police dog, have their car towed, or suffer other types of roadside detention unless they consented to a search.

Rudovsky, 1994 U. Chi. Legal F. at 250 (footnotes omitted).

The experience in Eagle County, Colorado, also shows that officers will not hesitate to use "traffic" stops to effect otherwise unconstitutional racial profile stops. In United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990), discussed supra at ___ n.16, Sergeant James Perry and other members of a drug task force testified that race was a factor in their drug courier profile. Id. at 337. Perry further testified that when the District Attorney refused to file charges in one of his "profile" stop cases, he learned that such profiling was unconstitutional, and he stopped using that technique (id.):

> [Perry] claimed that his entire practice as a Drug Task Force officer changed and that he would no longer simply stop people because they were Black or Hispanic with out-of-state plates. . . . After [that], Perry's activity logs markedly changed. His [earlier] logs are filled with the notation "CI" meaning "criminal investigation" as the reason for the stop. . . . After the [unconstitutional] arrest, Perry entered "TE" . . . for "traffic enforcement."
>
> If Perry's own records are to be construed literally, Perry went from being a Drug Task Force officer who went for days at a time without ever concerning himself with any traffic violations, to a drug enforcement officer obsessed with traffic enforcement. The logs, however, reflect that Perry's routine was unaffected by his sudden passion for traffic enforcement. He still stopped approximately the same number of vehicles . . . and his

[24] In stops for which records indicated the race of the driver, more than sixty percent of the drivers were members of racial minorities. Id. at 250 n.81.

> primary focus remained on out of state vehicles. His consent forms continued to be signed by a disproportionately high percentage of Spanish surnamed people.

The district court ultimately ruled that the "profile" originally used by the task force (the only "indicators" of which that could be observed at interstate highway speeds were the race of the occupants, out-of-state plates, darkened windows, a temporary CB antenna, a radar detector, and an indication that the vehicle was rented) violated the Fourth Amendment. Whitfield v. Board of County Commissioners, 837 F. Supp. 338, 340, 343-344 (D. Colo. 1993). Because the Tenth Circuit has now abandoned the "would have" test in favor of a test that allows stops upon reasonable suspicion of any traffic or equipment violation, see United States v. Botero-Ospina, 71 F.3d 783 (CA10 1995) (en banc), officers in Colorado will no longer have to concern themselves with whether such profiles amount to reasonable suspicion of a crime. They can simply rely on the civil traffic laws to justify all of their vehicle stops, no matter how far a particular stop deviates from established traffic enforcement practice. Officer Perry's transparent technique of changing his stops from "CI" stops to "TE" stops -- struck down under the "would have" test in Laymon -- will pass unchallenged.

Experience in the Fifth Circuit illustrates the way the "could have" test insulates such police abuse from judicial review. In United States v. Roberson, 6 F.3d 1088, 1092 (CA5 1993), cert. denied, 114 S. Ct. 1322 (1994), a Texas state trooper passed a van with out-of-state plates and four black occupants. The trooper

crested a hill, pulled to the shoulder and doused his lights. When the van -- the only other vehicle on that stretch of road -- changed lanes without signalling, he stopped the van, obtained consent to search, and found drugs. The Fifth Circuit noted that "[t]he record entices, but does not compel the conclusion that Trooper Washington purposefully precipitated the lane change by positioning his vehicle to force the van to change lanes on short notice." Id. at 1092 n.10.

The Fifth Circuit also noted the arresting officer's "remarkable record" for warrantless drug arrests after traffic stops -- about 250 of them in five years. "Indeed, this court has become familiar with Trooper Washington's propensity for patrol[l]ing the fourth amendment's outer frontier." Id. Given the abysmal "hit rate" of stops like these, see supra at __, it is troubling to imagine how many innocent motorists Trooper Washington must have stopped -- and what criteria he used to choose them -- to net 250 drug possessors. Yet, citing the sharply divided en banc decision in United States v. Causey, 834 F.2d 1179 (CA5 1987), the Fifth Circuit concluded that its hands were tied (id.):

> Hence, while we do not applaud what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring more serious violations, we may look no further than the court's finding that Trooper Washington had a legitimate basis for stopping the van.

See also Johnson, 63 F.3d at 247 (CA3 1995) (accepting "abus[e] [of pretextual stop rules] by the authorities" as "inherent in the nature of law enforcement"). This Court need not, and should not, accept such abuse as consistent with the Fourth Amendment where it

results in an intrusion that would not otherwise have been made.

II. THIS COURT'S PRECEDENTS SUPPORT THE RULE THAT A SEIZURE BASED ON A MINOR TRAFFIC INFRACTION IS "UNREASONABLE" IF A REASONABLE OFFICER IN THE SAME CIRCUMSTANCES WOULD NOT HAVE MADE IT.

This Court has consistently spoken out against pretextual use of government authority. In Florida v. Wells, 495 U.S. 1, 4 (1990), the Court reaffirmed that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Similarly, in United States v. Bertine, 479 U.S. 367, 372 (1987), the Court emphasized that "there was no showing that the police, who were following standardized [inventory] procedures, acted in bad faith or for the sole purpose of investigation." The Court in New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987), was likewise careful to point out that "[t]here is . . . no reason to believe that the instant [administrative junkyard] inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws." The Court in Colorado v. Bannister, 449 U.S. 1, 4 n.4 (1980) upheld seizure of contraband in plain view from a car stopped for a traffic violation, noting: "There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." Even the dissent in Prouse argued that the license checks in that case were "quite different from a random stop designed to uncover violations of laws that have nothing to do with motor vehicles." 440 U.S. at 665 (Rehnquist, J., dissenting).

Of course, the Court has also made clear that not all pretextual actions are "unreasonable." Objectively justified

seizures are permissible under the Fourth Amendment without regard to the subjective motivations of the police: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138 (1978) (emphasis supplied). The question that has divided the lower courts is what standard of objective justification applies when the defendant alleges that the asserted basis for a search or seizure was a pretext to evade applicable Fourth Amendment constraints. Although this Court has never had to decide that question, its precedents and the purposes of the Fourth Amendment support the rule that such intrusions are unreasonable if they deviate so far from standard police practices that a reasonable officer in the same circumstances would not have made the intrusion on the basis asserted. This standard prohibits arbitary intrusions without "immunizing" defendants suspected of greater crimes from stops that would otherwise have been made.

This Court's reluctance to attempt to pin down the subjective motivations of the police who actually made an intrusion makes sense, and the standard urged here does not require any finding of subjective motivation. As Justice White once put it: "[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of resources." Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting).

> [S]urely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.

Amsterdam, 58 Minn. L. Rev. at 436-437.

The court below -- like several of the "could have" courts -- misunderstood the test urged by petitioners when it reasoned that the "objective 'could have' standard" is better than the "open-ended 'would have' standard" because it "eliminates the necessity for the court's inquiring into an officer's subjective state of mind." J.A. 16-17, citing Maryland v. Macon, 472 U.S. 463, 470-471 (1985). The "would have" test is also a purely objective standard, looking at the objective circumstances through the eyes of a "reasonable officer," not at the subjective state of mind of the particular officer who made the stop. United States v. Cannon, 29 F.3d 472, 476 (CA9 1994); United States v. Smith, 799 F.2d 704, 710 (CA11 1986) ("would have" test focuses on "objective reasonableness rather than on subjective intent or theoretical possibility").

As a leading advocate of the "would have" approach has pointed out, focusing the inquiry on arbitrariness -- whether an officer's actions deviated from the usual practice in such a case -- is fully consistent with Scott's "objective reasonableness" test:

> [T]he proper basis of concern is not with why the officer deviated from the usual practice in this case but simply that he did deviate. It is the fact of the departure from the accepted way of handling such cases which makes

> the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.

1 W. LaFave, Search and Seizure § 1.4(e) at 120-121 (3d ed. 1996). This Court's decisions confirm that this approach, with its focus on compliance with standard procedures the police set for themselves and assurance that the intrusion would have been made absent any collateral motivation, is correct.

In Abel v. United States, 362 U.S. 217 (1960), the FBI suspected that Rudolf Abel was involved in espionage but lacked probable cause to arrest him. The F.B.I. brought Abel's alien status to the attention of the I.N.S. The I.N.S. determined that Abel was deportable and issued an administrative arrest warrant. This Court characterized pretextual use of administrative warrants as "serious misconduct," id. at 226, but concluded that the I.N.S.'s subsequent arrest of Abel and search of his hotel room were valid based on the district court's factual finding that the conduct of the I.N.S. agents "differed in no respect from what would have been done in the case of an individual concerning whom no . . . information [suggesting espionage] was known to exist." Id. at 227 (emphasis added). That finding was based in part on testimony "that it was 'usual' and 'mandatory' for the F.B.I. and I.N.S. to work together in the manner they did." Id. The Abel decision makes clear that a subjective motive to investigate other offenses cannot "immunize" a defendant from intrusions that would have been made in the normal course on the basis asserted. "[T]he F.B.I. is not to be required to remain mute regarding one they have

reason to believe to be a deportable alien, merely because he is also suspected of one of the gravest of crimes and the F.B.I. entertains the hope that criminal proceedings may eventually be brought against him." Id. at 228-29. Equally importantly, however, Abel indicates that such intrusions are not valid if they would not independently have been made.

In United States v. Robinson, 414 U.S. 218, 221 n.1 (1973), this Court explicitly suggested that "a departure from established police department practice" would be relevant to a pretextual traffic arrest claim but did not need to reach the issue. Robinson had alleged that the officer had "used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate had [the officer] sought a warrant." Id. The Court found it sufficient that 1) Robinson was "lawfully arrested for an offense" (which is essentially all the "could have" courts require); and 2) "the [officer's] placing him in custody following that arrest was not a departure from established police department practice" (as required by the "would have" courts). Id. (emphasis added).

In finding that standard practice was followed, the Robinson Court relied on the same MPD regulations at issue in this case. The Court cited D.C. Metropolitan Police Department General Order No. 3, series 1959 (Apr. 24, 1959), which required the officer to arrest Robinson for the crime of operating a motor vehicle after revocation of permit. Robinson, 414 U.S. at 221 n.1, citing id. at n.2. The Court explicitly "le[ft] for another day questions which

would arise on facts different from these." Id.[25] Here, of course, the officers' action was not only not required by MPD regulations; it was explicitly prohibited.

This Court's decision in United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983), does not, as several of the "could have" courts have erroneously concluded, speak to the question in this case. Villamonte-Marquez merely rejected the defendants' argument that customs officers could not rely on a statute allowing suspicionless boarding to inspect a vessel's documentation because they were accompanied by state police and were following a tip that a vessel in the area was carrying drugs. There was no indication (any more than there had been in Abel) that the challenged action departed from standard practice. Nothing in the Court's observation that "'[w]e would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers,'" id. at 584 n.3 (citation omitted), is at all inconsistent with a "would have" test for pretextual traffic stops. In fact, this statement assumes that the stop would have been made of an "ordinary, unsuspect vessel."

[25] The issue was not presented in the companion case of Gustafson v. Florida, 414 U.S. 260 (1973), because, although there were no comparable police regulations requiring custodial arrest, id. at 265, the defendant in Gustafson did not claim his arrest was pretextual or otherwise unlawful. See id. at 266-267 (Stewart, J., concurring) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made."); Robinson, 414 U.S. at 238 n.2 (Powell, J., concurring) ("Gustafson would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search undertaken for collateral objectives").

Under the "would have" test, as under Villamonte-Marquez, whether a traffic stop is valid or invalid depends not at all on whether the vehicle stopped was suspected of another crime.

If the essential purpose of the Fourth Amendment's reasonableness requirement is to protect against arbitrary invasions (Prouse, 440 U.S. at 653-54), whether a particular intrusion violated established police procedure must be part of any "objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time" (Scott, 436 U.S. at 136).

> Protection against arbitrary searches and seizures lies in controlling police discretion, which requires a determination that the police action taken against a particular individual corresponds to that which occurs with respect to other persons similarly situated. Judicial assessment of just what the category is (that is, who else really is "similarly situated") and whether or not like cases in fact receive the same disposition will be more meaningful and reliable if the record in the case reveals a preexisting police regulation on the subject.

Wayne R. LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 449 (1990).

As the six dissenters pointed out in the Fifth Circuit's decision in United States v. Causey, 834 F.2d 1179 (CA5 1987) (en banc), this Court's Fourth Amendment decisions have repeatedly turned on whether standard police procedures were followed. Id. at 1187, citing Bertine, 479 U.S. at 372; South Dakota v. Opperman, 428 U.S. 364, 376 (1976). Compare Prouse, 440 U.S. at 650 ("The

patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks promulgated by either his department or the State Attorney General.") with Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 452 (1990) (noting that "the guidelines governing [sobriety] checkpoint operation minimize the discretion of the officers on the scene").

As the Causey dissenters explained: "The emphasis on following standard procedures accords with the principles set forth in Scott. When standard practices . . . are followed, the police are acting in a fashion that is reasonable, objectively viewed, even if they have an ulterior motive." Causey, 834 F.2d at 1187. In short, reasonable officers follow procedure and enforce the laws impartially and uniformly. When action is taken in defiance of police regulations, that objective fact is relevant to the essential Fourth Amendment "reasonableness" inquiry: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

Here, one of the "facts available to the officers" was that they were forbidden by police regulations from taking traffic enforcement action in all but the most exigent circumstances. In light of that fact, a reasonable officer would not be warranted in believing that the stop of the Pathfinder for a minor civil traffic infraction was "appropriate." Under such circumstances, the "would have" test, consistent with this Court's Fourth Amendment

jurisprudence, condemns the action as arbitrary.[26]

III. THIS TRAFFIC STOP WAS OBJECTIVELY UNREASONABLE BECAUSE -- AS IS TRUE WITH OTHER STOPS THAT FAIL THE "WOULD HAVE" TEST -- ITS INTRUSIVENESS FAR OUTWEIGHED ANY LEGITIMATE GOVERNMENTAL INTEREST IN ACTING CONTRARY TO ESTABLISHED POLICE PROCEDURE.

A. The "Reasonableness" of a Law Enforcement Practice Is Determined by Balancing Its Intrusiveness Against Its Promotion Of Governmental Interests.

"[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Prouse, 440 U.S. at 654. The general law enforcement practice at issue in this case is the practice of making traffic stops that are based on probable cause of a technical traffic infraction, but that a reasonable officer in the circumstances would not have made based on that traffic infraction.

As a general matter, the government can hardly assert that it has a strong interest in taking action that is contrary to its own procedures. The government cannot credibly defend a two-tier system, under which certain minor traffic regulations theoretically apply to everyone but, as a matter of practice, are enforced only when the government deviates from its standard policy to target those citizens the police want to stop for some collateral reason not amounting to an objective justification. On the other side of the balance, the subjective intrusion on Fourth Amendment interests

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[26] As was argued below, petitioners contend that because this stop was not authorized under the applicable police regulations, it fails the "authorization" requirement imposed by some of the "could have" courts and must be invalidated on that ground in any event. See Johnson, 63 F.3d at 246; Scopo, 19 F.3d at 783; Trigg, 878 F.2d at 1041.

is heightened when the government arbitrarily singles out an individual for unusual treatment.

The particular law enforcement practice employed in this case -- the stopping of motorists for minor civil traffic infractions by plainclothes officers in unmarked cars where such stops are specifically prohibited by written police department regulations -- illustrates why stops that would not be made by reasonable officers cannot survive a Fourth Amendment balancing test.

B. The Practice at Issue Does Not Promote Traffic Safety.

The government has a legitimate interest in traffic safety. Prouse, 440 U.S. at 658. But the law enforcement practice at issue in this case does not not promote that interest. To the contrary, the very agency charged with advancing the District of Columbia's interest in traffic safety, the Metropolitan Police Department, has determined through its regulations that in the objective circumstances of this stop, that interest is not substantial enough to warrant the intrusion made here. Cf. Wright v. District of Columbia, 1990 U.S. Dist. LEXIS 7487, *14 (D.D.C. 1990) (ruling high-speed pursuit of traffic violator by unmarked car unreasonable under the Fourth Amendment: "While the District may reasonably have some cars totally unmarked for undercover work, there is no governmental interest in using these cars to pursue garden-variety traffic violators.").

1. The Non-Hazardous Nature of the Violations and Their Classification as Civil Infractions.

The infractions that ostensibly justified the stop in this case are set forth in Title 18 of the District of Columbia

Municipal Regulations (Vehicles and Traffic). Under 18 D.C.M.R. § 2213.4 (1995):

> An operator shall, when operating a vehicle, give full time and attention to the operation of the vehicle.

Under § 2204.3:

> No person shall turn any vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway without giving an appropriate signal in the manner provided in this chapter if any other traffic may be affected by such movement.[27]

Under § 2200.3:

> No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

Each of these offenses is non-criminal, to be adjudicated administratively through the Bureau of Traffic Adjudication. D.C. Code Ann. §§ 40-601, 40-611 through 40-616 (1990 & 1995 Supp.). See Purcell v. United States, 594 A.2d 527, 530 (D.C. 1991). The civil fine for each infraction is $25. 18 D.C.M.R. § 2600.1 (1995).[28]

In Welsh v. Wisconsin, 466 U.S. 740 (1984), this Court held

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[27] It is not clear that Mr. Brown was required to signal under the terms of this regulation. Because the Pathfinder was facing a T-intersection, there were no approaching cars to be "affected by" its movement. Even assuming there was a vehicle behind the Pathfinder, it would not matter to that car whether Mr. Brown turned left or right. Likewise, because cars travelling on Ely had the right of way (Tr. 59), their movement would not have been affected by a signal from Mr. Brown.

[28] The "unreasonable" speed violation is less serious than a speed violation measured in miles per hour over the posted limit, the penalties for which increase as the speed differential increases. The lowest penalty, for speeding "up to 10 mph in excess of limit," is $30. Id.

that Wisconsin's decision to classify a traffic offense as a noncriminal, civil forfeiture offense, subject to a maximum fine of $200, was "the best indication of the State's interest in precipitating an arrest." Id. at 754. Likewise, the District of Columbia's decision to classify the violations here as civil infractions with a maximum penalty of $25, is the best indication of its minimal interest in stopping vehicles for those violations -- even when such a stop would be permitted by police regulations.

Indeed, MPD regulations provide that traffic enforcement action is to be targeted against those committing "hazardous violations." MPD General Order 303.1(I)(A)(1)(e).[39] The record, including Officer Soto's testimony that the conduct did not justify more than a warning (Tr. 72-73), makes clear that the violations in this case were not "hazardous." Thus, MPD has made the judgment that police enforcement of minor traffic infractions such as those

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[39] The MPD General Orders are not merely aspirational suggestions for proper police behavior. They are the MPD's "[p]ermanent directive[s] of policy and procedure." MPD Operational Handbook Introduction at 1 (effective January 1, 1991) ("Operational Handbook"). "Failure to obey orders or directives issued by the Chief of Police" is prohibited conduct that "shall serve as the basis for an Official Reprimand or Adverse Action." MPD General Order 1202.1(I)(B)(16) (revised effective May 1, 1991). Absent extraordinary circumstances, the penalty for the first such offense shall range from "[r]eprimand to removal." Id.

These binding orders are the product of extensive review and written comment by "staffing teams" comprising "at least one officer, sergeant, lieutenant, and captain from each sector or branch," who in turn are directed to solicit from other personnel comments on all proposed directives. Operational Handbook 18-19. Thus, the government was correct in Robinson when it referred to MPD General Orders as "the experience of the District of Columbia police force, distilled in the standardized procedure" at issue. Brief for the United States in United States v. Robinson, No. 72-936, at 31.

alleged here does not significantly advance the District of Columbia's interest in traffic safety.

2. The Regulation Prohibiting Officers Not in Uniform or in Unmarked Cars from Enforcing These Violations.

To be sure, the District of Columbia has some interest in enforcing even its most minor traffic regulations. But MPD has made the judgment that, except for a violation that is "so grave as to pose an immediate threat to the safety of others," that interest does not objectively justify a vehicle stop by officers out of uniform or in unmarked cars. MPD General Order 303.1(I)(A)(2)(a)(4) (emphasis in original). The infractions observed here were indisputably outside this very narrow exception (Tr. 72-73).

The MPD's prohibition on traffic enforcement by officers out of uniform or in unmarked cars except in the most exigent of circumstances is a wise one, grounded in the personal security concerns at the heart of the Fourth Amendment. Officers create grave safety risks, both to themselves and the unsuspecting motorist, when they attempt to seize a car and its passengers without the uniforms and equipment that clearly identify them as police. See MPD General Order 308.13(I)(B)(1) ("It is of utmost importance that members of casual clothes/non-uniform units be identified as police officers by the general public, as well as fellow police officers, in their true role so as to prevent false reports, minimize confusion at any crime scene, and eliminate erroneous identification as armed criminals."). Concerns about

carjacking[30] and other crimes against motorists create the potential for dangerous misunderstandings when armed nonuniformed officers attempt to stop motorists. The results of such encounters can be tragic.

In one recent case in New York, a young, foreign-born, pediatric resident took a wrong turn in an unfamiliar part of town and paused to look at his directions. Two plainclothes narcotics officers blocked his path with their unmarked car and approached him, displaying their badges. Apparently unsure of their identity, the doctor put the car in reverse, striking one of the officers. He then drove towards the other plainclothes officer, who shot and killed him. Kim, Family Wants Answers, Newsday, Mar. 20, 1993, at 4. It appears that the motorist in that case had done nothing more serious than fail to "pay full time and attention" in a bad neighborhood. The public interest in deterring such conduct, although technically a traffic infraction, hardly outweighs the public interest in avoiding dangerous confrontations between motorists and ambiguously identified officers.

Even if this Court were inclined to weigh differently the degree to which a seizure such as this one promotes the public interest in traffic safety, it is appropriate in evaluating the

[30] There were 245 carjackings in the Washington area in the first seven months of 1992, including one that drew nationwide attention. Thomas-Lester and O'Donnell, Forces Team Up to Fight Carjacking and Its "Fear Factor", The Washington Post, Oct. 3, 1992, at B1 (discussing Pamela Basu case, in which a local woman was dragged to her death and her baby thrown from her car by two carjackers). After a spate of carjackings about two miles from the site of the Pathfinder stop, the 6th District of the MPD assigned a detective to investigate carjackings full time. Id.

government interest at stake to defer to the District of Columbia's own judgment of the usefulness of a particular enforcement practice. Cf. Sitz, 496 U.S. at 453-54 ("for purposes of Fourth Amendment analysis, the choice among . . . reasonable [enforcement] alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers").[31]

C. The Individual's Interest Under the Fourth Amendment.

1. The Intrusive Nature of Traffic Stops by Non-Uniformed Officers in Unmarked Cars.

This Court has rejected the argument that the Fourth Amendment has nothing to say about how a seizure was made:

> [Such a claim] ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."

Tennessee v. Garner, 471 U.S. 1, 7-8 (1985), quoting United States v. Place, 462 U.S. 696, 703 (1983). "Because one of the factors is

[31] The D.C. Circuit, like many of the other "could have" courts, refused to consider whether this stop deviated from established police procedure because it wanted to "ensure[] that the validity of the traffic stop 'is not subject to the vagaries of police departments' policies and procedures'" (J.A. 17-18) (citation omitted). But this Court has not hesitated to have the scope of Fourth Amendment protections turn on the content of local police regulations. Under Florida v. Wells, 495 U.S. 1 (1990), whether police are permitted to open containers found during an inventory search turns entirely on whether the police agency at issue has a policy on that subject and whether that policy sufficiently regulates discretion through "standardized criteria" or "established routine." Id. at 4-5.

the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." Id. at 8.

In Prouse, this Court considered the physical and psychological intrusions on a motorist's liberty when he is stopped for a random license and registration check, comparing it to the similar intrusions of roving patrol stops by Border Patrol agents struck down in United States v. Brignoni-Ponce, 422 U.S. 873 (1975):

> Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety.

Prouse, 440 U.S. at 657.

Stops by plainclothes officers in unmarked cars are much more "unsettling" and intrusive because of the element of surprise and uncertainty as to the authority of the persons doing the seizing. They are therefore even more unlike permissible checkpoint stops than the random stops condemned in Prouse: "'At traffic checkpoints the motorist . . . can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'" Prouse, 440 U.S. 657 (quoting United States v. Ortiz, 422 U.S. 891, 894-895 (1975)). See also Sitz, 496 U.S. at 453 (noting that sobriety checkpoints were operated by

"uniformed police officers").[32]

Just as an "'unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home,'" 2 W. LaFave, Search & Seizure § 4.8(a) at 599 (3d ed. 1996), quoting State v. Carufel, 112 R.I. 664, 314 A.2d 144 (1974), so too does an attempted traffic stop by a non-uniformed officer in an unmarked car risk the safety of both the officer and the motorist. See supra at __. See also Baker and York, Plan Set to Combat Carjackings, The Washington Post, Sept. 13, 1992, at A1 (quoting American Automobile Association spokesman's statement that motorists are "frightened to the bone" because of carjackings and are threatening to conceal weapons for protection). Of course, not all vehicle stops by unmarked cars are therefore unreasonable, just as not all unannounced entries are unreasonable. See Wilson v. Arkansas, 115 S. Ct. 1914, 1918-1919 (1995). But the additional intrusion on a citizen when he is not given warning of an intrusion is a factor to be weighed against the need for the intrusion under "[t]he Fourth Amendment's flexible requirement of reasonableness" (id. at 1918).

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[32] This Court has explained that the relevant "subjective intrusion" is "the fear and surprise engendered in law-abiding motorists by the nature of the stop." Sitz, 496 U.S. at 452. While the citizens who are stopped under the D.C. Circuit's test are not technically "law abiding" in that they have presumptively committed some minor traffic infraction, they may well be unaware of it. By definition, the stops at issue here -- those that deviate from police policy -- are unexpected.

2. The Individual's Interest in Being Free From Arbitrary Police Intrusions.

A citizen who is stopped by plainclothes officers in an unmarked car for a minor civil traffic infraction of which he may not even be aware, and for which he would not ordinarily expect to be stopped even by a marked cruiser, suffers the further intrusion of knowing that he has been arbitrarily singled out by law enforcement. This Court in Sitz, noted that the sobriety checkpoint guidelines required that "[a]ll vehicles passing through a checkpoint would be stopped" (496 U.S. at 447) and, in evaluating the subjective intrusion on motorists, considered that the officers "stop every approaching vehicle" (id. at 453). It is always "unsettling" to be pulled over by a police officer, even when one knows in one's heart it is justified. But to be pulled over for no apparent reason, by an officer who has clearly deviated from standard procedure to do so, brings the intrusion to an entirely different level.

The significance of the subjective impact of obvious arbitrariness should not be underestimated. Young black men, long-haired teenagers, out-of-state visitors, and those who make their political views known by means of signs on their bumpers, should not have to wonder what it was about them that made their government target them for arbitrary enforcement. The lasting impact of an apparently arbitrary stop was movingly expressed by an Episcopal priest who was stopped, apparently baselessly, on the New Jersey Turnpike while driving with his college-aged son and godson: "We were left with the nagging question of whether we had been

stopped because we were three black males in a moving van. We had seen the troopers and they had seen us. And if we were stopped for the reason they gave [a report of similar truck swerving], why were we all so shaken by this encounter?" Brown, Highway Confrontation Raises Questions, Washington Diocese at 3 (Oct. 1995).

D. The Balance Weighs In Favor of Petitioners In This Case.

The balance here favors the motorist even more clearly than it did in Prouse. In Prouse, the State of Delaware claimed a strong interest in using discretionary license and registration checks as a means of promoting traffic safety, but this Court concluded:

> The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure . . . at the unbridled discretion of law enforcement officials.

440 U.S. at 661. This case is easier than Prouse because there is no genuine conflict for this Court to resolve between the government's interest in traffic safety and the Fourth Amendment interests of motorists. The objective evidence -- including the District of Columbia's own police regulations -- refutes any claim that traffic stops like the one made in this case promote its interest in traffic safety. As in Prouse, "the incremental contribution to highway safety" (id. at 659) (if any) of arbitrary stops like this one, does not justify the intrusion visited on those motorists who are singled out in contravention of established police procedure.

The Prouse Court was concerned that:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon

> some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . "

Id. at 661 (quoting Terry, 392 U.S. at 22). This Court has never had to decide whether an allegedly pretextual factual basis is an "appropriate factual basis" where a reasonable officer would not have relied upon it to make the stop. But the Court's concern in Prouse that, in the absence of a traffic violation, "we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver" (id.), is equally applicable here. As petitioners have shown, merely requiring a technical traffic infraction does not, as a practical matter, constrain the discretion of the officer in the field. Where the objective evidence shows that such discretion has been used arbitrarily -- where an officer has acted in contravention of established police practice -- the stop is not reasonable.

The clear language of the Fourth Amendment requires the reasonableness standard embodied in the "would have" test. The D.C. Circuit's ruling precludes any judicial inquiry into the Fourth Amendment reasonableness of automobile stops whenever the police can claim probable cause of an infraction. While the vast majority of such stops are clearly reasonable, the Fourth Amendment demands that courts have the authority to review and invalidate those few stops that are not objectively reasonable -- particularly since for every one such stop that a judge sees, there are many

other innocent motorists who have suffered similar intrusions. Here, the district judge suggested that she did not consider the officers' actions appropriate under the circumstances ("[the stop] may not be what some of us believe should be done, or when it should be done, or how it should be done") (J.A. 5), but felt constrained to uphold the stop as long as the officers had witnessed some -- any -- technical traffic violation. When a stop prompts a court to question its "what," "when" and "how," the court should not be precluded from looking at the totality of the objective circumstances of the stop in deciding whether it was reasonable. The "would have" standard does not interfere with legitimate police conduct. But it does give courts the authority to strike down those traffic stops -- like this one -- that are arbitrary and unreasonable.

CONCLUSION

The police violated the Fourth Amendment when they unreasonably seized the vehicle in which petitioners were riding. The trial court erred in refusing to suppress the fruits of that seizure, including all of the contraband seized after the stop. Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals for the District of Columbia Circuit, and remand for entry of an order vacating petitioners' convictions and suppressing all evidence seized as a result of the unconstitutional seizure in this case.

Respectfully submitted,

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February 16, 1996

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ADDENDUM

Metropolitan Police Department □ Washington, D.C.

GENERAL ORDER

Subject:	Series	Number	Distribution	Change Number
Traffic Enforcement	303	1	A	1
	Effective Date: April 30, 1992			
	Revision Date:			

The purpose of this order is to establish the policy and procedures for carrying out an effective traffic enforcement program. This order consists of the following parts:

PART I Responsibilities and Procedures for Members of the Department

- A. Objectives and Policies.
- B. Summary Arrests.
- C. Notices of Infractions (NOI's).
- D. Warning NOI's.
- E. NOI's issued to Postal Service Employees.
- F. Traffic Violations by Other Operators of Government Vehicles.
- G. Enforcement of Pedestrian Regulations.
- H. Enforcement of Public Regulations.
- I. Enforcement of Traffic Regulations Pertaining to the Operators of Bicycles.
- J. Enforcement of the Parking Regulations.
- K. Enforcement of the 72 Hour Parking Restriction.
- L. Department of Administrative Services' Parking Lots.
- M. Enforcing Violations of Excessive Smoke.
- N. Information to be Furnished the Motor Vehicle Inspection Stations Concerning Vehicles Conveyed There for Inspection by Members.
- O. Enforcement of Moped Regulations.
- P. Traffic School Information.
- Q. Processing Citizens' Complaints Relative to Motorists Illegally Passing Stopped School Buses.
- R. Congressional Tags.
- S. Elected City Officials.
- T. Military Personnel.
- U. Use of Radar Equipment.

PART II Responsibilities and Procedures for Special Assignment Personnel

- A. Station Clerks.
- B. Traffic Enforcement Branch Personnel, Special Operations Division.

PART III Responsibilities and Procedures for Supervisory and Command Personnel

- A. Commanding Officer, Traffic Enforcement Branch, Special Operations Division.
- B. District Commanders.
- C. Patrol Operations Officer.

PART I

A. Objectives and Policies.

This department's traffic enforcement policies and objectives are as follows:

1. Objectives.

   a. To prevent traffic accidents;

   b. To promote greater traffic safety awareness by the public;

   c. To facilitate the efficient flow of traffic;

   d. To ensure the convenience and safety of all users of public roadways including pedestrians, bicyclists, and motorists;

   e. To target enforcement activities against those committing hazardous violations;

   f. To selectively enforce the Traffic Regulations, (DCMR, Title 18, Vehicles and Traffic) in proportion to the occurrence of traffic accidents or citizen complaints;

   g. To implement the selective enforcement policy with respect to time, place, frequency, and type of violation; and

   h. To assist employees of the Department of Public Works (DPW in the District of Columbia Parking Enforcement Program.

2. Policies.

a. Traffic enforcement action may be taken under the following circumstances:

(1) By on duty uniformed members driving marked departmental vehicles; or

(2) By off duty uniformed members driving marked departmental vehicles while participating in the department's take home cruiser program; or

(3) By on duty uniformed members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch operating unmarked departmental vehicles; or

(4) Members who are not in uniform or are in unmarked vehicles may take enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.

b. In each instance of a stop for a traffic violation, the member shall:

(1) Issue either a Notice of Infraction (NOI); or

(2) Issue a Warning NOI; or

(3) Under extreme circumstances an oral warning may be given (e.g., receipt of a radio assignment requiring immediate response, or the motorist was enroute to a hospital for emergency treatment of a sick or injured passenger).

c. On-duty members shall not:

(1) Conceal themselves from the view of the public for traffic enforcement purposes; or

(2) Park department vehicles in such a manner that will impede the flow of traffic or create hazardous conditions.

d. This order does not supersede the provisions of either law or departmental orders pertaining to persons who have either Congressional or diplomatic immunity.

e. Members are expected to be courteous and polite when making stops for either traffic or pedestrian violations. Members shall:

(1) Identify themselves and their element;

(2) Inform the motorist why he/she has been stopped; and

(3) Not enter into discussions with citizens over the legality or justification for the citation or arrest.

B. Summary Arrests.

1. Members shall make summary arrests and prepare NOI's for the following offenses:

a. Reckless driving;

b. Leaving the scene after colliding, with personal injury and property damage;

c. Driving under the influence of intoxicating liquor or drugs;

d. Operating without a valid permit;

e. Operating after suspension or revocation;

f. Operating over 30 mph in excess of the posted speed limit;

g. Failure to surrender permit after suspension or revocation; and

h. Smoke screens.

2. When members stop motor vehicles for a minor traffic violation and the operator of the motor vehicle exhibits a recently expired operator's permit, the member:

a. May issue the operator an NOI for "No Permit" or "No D.C. Permit;" and

b. Shall not summarily arrest the operator of the vehicle if it appears that the operator has through oversight, allowed the permit to expire.

3. Members shall make a summary arrest for "No Permit" or "No D.C. Permit" where no operator's permit has been issued or the permit has been expired for more than 90 days. Before the operator of the vehicle is released, the member shall advise the operator:

a. That until renewal he/she cannot legally operate a motor vehicle in the District of Columbia; and

b. That only a validly licensed operator or tow truck operator can remove the vehicle from its present location.

4. When members stop motor vehicles for minor traffic violations and the operator fails to exhibit an operator's permit but states that he/she does have one, the member shall check WALES to verify that a permit has been issued and is still valid.

5. In the event that WALES is not in operation, members shall:

a. If inquiring from his/her element, contact the Telecommunication Operations Branch, Communications Division, by telephone, and request that the subject's identifying information be run through the Department of Public Works, Transportation Systems Administration Computer Network (information such as partial spelling of the person's first, middle and last name and his/her approximate date of birth will help identify the individual); or

b. If inquiring via radio communications, contact the Communications Division dispatcher who will in turn, contact the Telecommunication Operations Branch for assistance.

6. When an operator's permit status cannot be verified through the Communications Division dispatcher or the Telecommunication Operations Branch personnel, members shall:

a. Summarily arrest the operator for "No Permit;"

b. Transport the operator to the arresting member's element or closest element; and

c. Have the operator processed.

7. If the operator has been issued a permit which is still valid, the member shall issue the operator an NOI for "Failure to Exhibit a Permit" in addition to NOI's for any other infraction which the operator may have committed. The operator may be permitted to continue to operate the vehicle.

8. When it is determined that the arrestee does in fact, have a valid driver's permit and he/she has already been arrested for "No Permit," the member shall:

a. Immediately initiate the procedures for placing a person on the Detention Journal, set forth in General Order No. 502.5 (Detention Journal); and

b. Issue the arrestee an NOI for "Failure to Exhibit a Permit."

9. When a person is stopped for a traffic violation and a WALES check reveals that there is an outstanding Superior Court warrant on file, the member shall place the violator under arrest and arrange for him/her to be transported to the nearest district station where the WALES check can be verified and the appropriate action taken. A "Hit" on an out-of-state warrant should be verified with the entering agency prior to arrest, as outlined in General Order 302.6 (WALES).

10. When a member stops a motorist for a traffic violation and it is determined that there is a suspension or revocation order pending against the motorist, the issuing member shall:

a. Complete a DOT Form 33-40 (Official Notice of Proposed Suspension);

b. Request the signature of the person to be served and issue the pink copy to the operator. Should the operator refuse to sign the Official Notice of Proposed Suspension, enter the word "Refused" in the space provided for the operator's signature. The operator shall not be summarily arrested for refusing to sign the notice; and

c. Release the operator after the appropriate police action has been taken.

11. Members who make summary arrests or issue NOI's for the following offenses shall submit a PD Form 31 (Report to DOT for Flagrant Violations), in triplicate, to the Chief of Police, who will then forward it to the Director, Department of Public Works:

a. Homicide, operation of motor vehicle involved;

b. Reckless driving-involving bodily injury;

c. Physically unqualified to drive an automobile;

d. Lending of one's DC Permit;

e. Charged with a felony, motor vehicle involved;

f. Offenses tending to reflect on character of a taxi cab operator (Hacker);

g. Colliding and failing to stop;

h. Speed, 30 MPH or more in excess of posted speed limit;

i. Excessive smoke or defective exhaust;

j. Permitting an unlicensed operator; and

k. Any other flagrant traffic violation which the member feels should be called to the immediate attention of the Director, Department of Public Works.

C. Notices of Infractions (NOI's).

In addition to those offenses requiring summary arrests in Part IB, an NOI shall also be issued for any offense which in the prudent judgement of the issuing member exhibited a flagrant disregard for the law and was likely to cause an accident or endanger the safety of pedestrians, bicyclists, or other motorists.

D. Warning NOI's.

1. Members may issue Warning NOI's for offenses that do not require the summary arrest of the motor vehicle operator.

2. Members shall not issue a Warning NOI to a motorist who has:

a. Committed a Right Turn on Red Offense;

b. Committed an offense which caused an accident;

c. Failed to Yield the Right of Way to a Pedestrian; or

d. Committed any parking violation.

3. The decision as to whether to issue the motorist a Warning NOI or an NOI shall be based upon the sound judgement of the member making the traffic stop.

E. NOI's issued to U.S. Postal Service Employees.

In dealing with operators of vehicles of the Postal Service, members shall bear in mind that movement of the mail shall not be unduly delayed; however, U.S. Postal employees are required to obey the law and have no immunity from arrest.

1. The U.S. Postal Service has requested that moving traffic violations committed by operators of their vehicles be reported. In cases where enforcement action is taken by members of this department against operators of Postal Service vehicles, members shall:

a. Complete a PD Form 101 (Report of Violation of the Traffic Regulations by Operators of Vehicles Owned by the District of Columbia or the U.S. Government) in duplicate and distributed as noted.

b. If the operator of a vehicle is transporting U.S. Mail, the member shall expedite the transaction and shall not detain the operator any longer than absolutely necessary to secure the pertinent information for the completion of the citation and the PD Form 101.

2. Whenever a member wishes to speak with, serve a summons upon, or arrest an employee of the U.S. Postal Service at the Main Post Office, he/she shall contact the Director, Employees and Labor Relations, U.S. Postal Service, on weekdays between 0800 and 1700 hours (at other times, the Postal Inspector in charge may be contacted for this purpose).

3. If it becomes necessary to arrest an operator of a vehicle carrying mail on the street, the member shall:

a. Immediately notify the Inspector in charge, Postal Inspector's Office, U.S. Postal Service, in order that someone may respond to take charge of the mail and the vehicle; and

b. Take all necessary precautions to protect the mail.

4. If the operator of a postal vehicle violates the law or Municipal Regulations and flees into the City Postal Service Building or garage, the member will not be interfered with in effecting his/her arrest provided the member is able to apprehend the employee before he/she is able to exit the postal vehicle, or go beyond the immediate vicinity of the vehicle.

Note: If the member is a plainclothes officer and the circumstances permit, he/she should stop at the guard's office or post and be identified prior to taking any further action.

5. Members must contact the tour superintendent on duty if the employee should flee into any other part of the Postal Service Building. The tour superintendent will see that the employee in question is brought to the member or that the member is taken to the employee.

F. Traffic Violations by other Operators of Government Vehicles.

Whenever the operator of a motor vehicle bearing District of Columbia or U.S. Government license plates or a vehicle otherwise identifiable as being owned by either government is arrested for a traffic violation or is involved in an accident and it appears that the operator is at fault, the member handling the incident shall prepare a PD Form 101 as noted and follow the distribution schedule the morning following the day the case is disposed of in court.

G. Enforcement of Pedestrian Regulations.

Uniformed members of the force shall be responsible for the enforcement of all traffic laws and regulations pertaining to pedestrians. Primary emphasis shall be placed on those offenses where the pedestrian, through violation of existing statutes, creates a danger to himself, other persons, or the motoring public.

1. A separate criminal sanction is applicable in situations where a pedestrian violator refuses or fails to inform a member of his/her true name and address to facilitate proper issuance of an NOI.

2. Pedestrian violators shall not, however, be required to produce or display documentary evidence of identity unless the name and address furnished to the member at the time of the stop is known to be, or is reasonably suspected of being, fictitious. In this instance, members shall:

a. Caution the pedestrian that continued refusal(s) to provide correct identity could result in the violator's arrest; and

b. Issue an appropriately completed NOI for "Failure to Make Proper Identity Known," a Superior Court charge, should an arrest become necessary.

Note: Absent articulable facts and circumstances supporting an member's belief that a pedestrian violator is intentionally providing false or fictitious information, the citizen's verbal disclosure of identity must be accepted.

3. Pedestrian violations involving juveniles under the age of 16 shall be processed according to the procedures set forth in General Order 305.1 (Handling Juveniles).

4. Warning NOI's may be issued for pedestrian violations when, in the judgement of the issuing member, a warning NOI rather than an NOI is appropriate.

a. All appropriate spaces of the NOI shall be completed; and

b. The word "WARNING" shall be written in the space for indicating the amount of collateral.

H. Enforcement of Public Vehicle.

It is the responsibility of all uniformed members on patrol to enforce the public vehicle regulations.

I. Enforcement of the Traffic Regulations Pertaining to the Operators of Bicycles.

Bicycle operators are required to comply with applicable traffic regulations. Uniformed members of the force on patrol shall enforce the traffic regulations pertaining to bicycle operators, giving particular emphasis to violations which at that time and place, unduly impede or obstruct traffic or endanger the bicycle rider or other persons.

J. Enforcement of the Parking Regulations.

Uniformed members on patrol shall enforce the parking regulations, giving primary attention to the more serious parking infractions (e.g., rush hour violations, obstructing fire hydrants, parking in alleys, and those parking violations which may contribute to an accident).

K. Enforcement of the 72 Hour Parking Restrictions.

Whenever it is brought to the attention of members of the department that a vehicle is reportedly parked in violation of the 72-hour restriction, the investigating member shall:

1. Check WALES for a stolen or wanted report on the vehicle.

   a. If the vehicle has been reported stolen or has a want status (e.g., use in a robbery holdup, kidnapping or recovered), the vehicle shall be impounded pursuant to General Order 601.1 (Recording, Handling and Disposition of Property Coming into the Custody of the Department);

   b. If it is determined that the vehicle is not wanted, the member shall prepare PD Form 866 (Overtime Parking Sticker). The PD Form 866:

      (1) Has an adhesive back designed to stick on a rubber surface (the card containing the PD Form 866 shall be carried in back of the NOI Book); and

      (2) Shall be placed on the tire tread so as to be readily visible to investigating members.

2. Whenever a member prepares an NOI based upon the information contained on the PD Form 866, he/she shall record the pertinent facts on the back of the number one copy of the citation.

L. Department of Administrative Services Parking Lots.

The Department of Administrative Services (DAS) has under its control and jurisdiction a number of parking lots used by government personnel. Some DAS officers are authorized to write parking citations while others will require assistance from the MPD. The following is the procedure to be followed in dealing with parking violations on DAS property:

1. A member who receives an assignment to assist DAS officers with parking violations shall note the name of the DAS officer/complainant on the back of the citation and issue the NOI and/or impound the vehicle.

2. In the event the violator chooses to appear at the Bureau of Traffic Adjudication hearing, the member shall summons the complainant as a witness.

M. Enforcing Violations of Excessive Smoke.

1 Whenever an NOI is issued for excessive smoke on a vehicle, the issuing member shall prepare (in addition to the NOI), a PD Form 31 (Report to the Director, Department of Transportation for Flagrant Traffic Violations) in triplicate

   a. The PD Form 31 is not to be issued to the violator;

   b. All copies of the PD Form 31 and the first and third copies of the NOI shall be turned in to an official at the expiration of the member's tour of duty (If the operator to whom an NOI is issued is not the owner of the vehicle, the owner of the vehicle in violation may also be issued an NOI if he/she knowingly permitted the vehicle to be operated in violation); and

   c. The Department of Public Works will then issue a notice directing the owner to submit his/her vehicle for inspection within 72 hours.

   Note: In doubtful or borderline cases, members of the force shall not issue NOI's, but shall prepare a PD Form 31 so the vehicle may be inspected by the appropriate authority.

2. When persons elect to appear at the Bureau of Traffic Adjudication hearing to contest excessive smoke charges, arrangements shall be made by the issuing member for a motor vehicle inspector to appear as a witness for the government. This can be accomplished by contacting the Chief Inspector, Vehicle Section, Department of Public Works.

N. Information to be Furnished the Motor Vehicle Inspection Stations Concerning Vehicles Conveyed There for Inspection by Members.

1. When a member of this department causes a motor vehicle to be presented to a District of Columbia Motor Vehicle Inspection Station for examination, he/she shall furnish, or cause to be furnished to the inspector in charge, the following information:

   a. The name and address of the owner and/or operator;

   b. The purpose of the inspection; and

   c. The name and element of the member initiating the action.

2. Upon completion of the inspection and the owner and/or operator is not present to take possession of the motor vehicle, members shall comply with the provisions of General Order 601.1 (Procedures for Handling Property).

O. Enforcement of Moped Regulations.

1. The District of Columbia Motorized Bicycle Act, D.C. Law 1-110 defines a "Motorized Bicycle" (moped) as a motor vehicle with:

a. Two or three wheels;

b. A seat;

c. An automatic transmission; and

d. An engine no larger than 50 cubic centimeters capable of producing no more than 1.5 horsepower or a maximum speed of 25 mph.

2. Mopeds operated within the District of Columbia are considered motor vehicles, and as such, fall within the scope of the District law that forbids the operation of a motor vehicle without the permission of its owner. The application of D.C. Code 22-2204 (Unauthorized Use of Vehicles) also applies when an arrest is made for the unauthorized use of a moped.

3. Out-of-state moped operators who have complied with the law of their state need not register their moped in the District (District residents must register their mopeds). The States of Maryland and Virginia do not require mopeds to be registered.

4. All operators of mopeds from Maryland and the District of Columbia must have a permit. Operators of mopeds from states which do not require a license may operate a moped in the District of Columbia without a license.

5. The following rules apply to mopeds operated in the District of Columbia:

a. No helmet is required;

b. No insurance is required;

c. A moped may be parked like a bicycle;

d. Operators must obey all motor vehicle rules;

e. The operator must be at least sixteen years of age;

f. Mopeds may not be operated on any sidewalk, off-street bike path, or bicycle route unless motor vehicles are allowed;

g. Mopeds may be operated on any part of a roadway designated for the use of bicycles; and

h. All mopeds registered in the District must be inspected once every three years; rental mopeds must be inspected annually.

6. Any individual operating an unregistered moped in the District of Columbia that is required to be registered shall be cited for "Using or Permitting Use of Unregistered Vehicle." The operator shall be allowed to proceed but the moped shall not be allowed to be operated. Members impounding mopeds shall utilize the services of their district's motorscooter trailer.

a. The moped may be impounded for safekeeping (no impoundment fee); or

b. Operated after it has been registered.

7. NOI's shall be issued to mopeds and operators of mopeds for violations of the DCMR, Title 18, "Vehicles and Traffic."

P. Traffic School Information.

1. A citizen who receives a moving violation may elect to attend Traffic School in lieu of receiving points against his/her license under the following circumstances:

a. When he/she is referred by the Superior Court, or the Corporation Counsel's Office, Superior Court; or

b. When he/she is referred by the Bureau of Traffic Adjudication.

2. Unless referred by Superior Court or BTA, violators are ineligible for Traffic School.

3. Violations for which forfeiture of collateral is not permitted (e.g., driving under the influence, hit and run, etc.), will make the offender ineligible for Traffic School unless referred by the Superior Court.

4. Within fifteen (15) days of the date of issuance, the violator must pay the fine at the Bureau of Traffic Adjudication Cashier's Office, 65 K Street N.E. (for BTA charges) and request a Bureau of Traffic Adjudication hearing; or at the D.C. Finance Office for the Superior Court, 500 E Street N.W. (Superior Court charges).

5. Upon disposition of the traffic case the violator must, within five (5) days, appear in person at the Traffic Enforcement Branch (excluding Sundays and holidays), to register for Traffic School.

6. A listing of the names of all persons registered for Traffic School (together with the NOI number and the completion date of the scheduled class) shall be compiled daily by the Traffic Enforcement Branch, Special Operations Division and forwarded to the Bureau of Traffic Adjudication for entry and updating of pertinent data into computer systems.

7. In order to complete the course, the violator must attend each of the scheduled classes. He/she must report at the scheduled time and place and present his/her ATTENDANCE CARD (PD 200B):

a. The ATTENDANCE CARD is stamped at the end of each session; and

b. At the end of the final session, test scores and the signature of the Commander, Traffic Enforcement Branch is affixed to certify that the violator has successfully completed the course (this constitutes final disposition of the traffic case).

Q. Processing Citizens' Complaints Relative to Motorists Illegally Passing Stopped School Buses.

1. When a citizen (including a school bus driver) reports that he/she has witnessed a vehicle illegally pass a stopped school bus with its warning lights activated, the member taking the report shall:

a. Prepare a PD Form 251 (Event/Offense Report) and a PD Form 252 (Supplement Report) on each reported occurrence. The PD Form 251 report shall include:

(1) The license tag number and description of the offending vehicle;

(2) Any physical description of the motorist operating the offending vehicle; and

(3) A notation concerning whether the witness believes himself/herself able to identify the motorist.

b. The PD Form 252 (Supplement Report) shall include the name, address, and telephone number(s) (home/work) of each person witnessing the incident.

2. Prior to the end of the tour of duty, the member taking the complaint from the citizen shall present the PD Forms 251, 252, and other relevant documents to the watch commander.

3. The watch commander shall ensure that the incident is referred to the Traffic Enforcement Branch, Special Operations Division, within twenty-four hours.

a. The originals of the PD Forms 251 and 252 shall be forwarded to the Information Processing Section, Data Processing Division; and

b. A copy will be forwarded to the Traffic Enforcement Branch, Special Operations Division.

R. Congressional Tags.

This order is not intended to supersede the provisions of the law pertaining to persons who have Congressional immunity.

1. Members of the force are reminded that Title 40, Chapter 7, Section 703 of the District of Columbia Code provides for the issuance of Congressional tags to members of Congress and other selected individuals connected with Congress for their official use which, when used by them while on official business, shall authorize them to park their automobiles in any available curb space in the District of Columbia except within fire plug, fire house, loading station, and loading platform limitations.

2. The Congressional tags referred to above are issued by the Department of Public Works and are made of metal. The tag is made to be attached to the regular vehicle license plate and indicates the current session of Congress with further identification of "H" or "S" followed by a number.

S. Elected City Officials.

Elected city officials are required to attend many meetings and functions throughout the day and evening on a city-wide basis, therefore, it is the department's policy to take this into consideration and extend to them the same courtesies afforded members of Congress relative to parking infractions.

T. Military Personnel.

1. The Department of Public Works does not recognize operator's permits issued by military units or facilities as valid.

2. Active members of the Armed Forces exhibiting expired operator's permits from jurisdictions that extend the actual permittee's expiration to coincide with the date of the member's discharge shall:

a. Not be issued an NOI for "No D.C. Permit;" and

b. Be permitted to continue the operation of their motor vehicle.

3. Active members of the Armed Forces who possess a District of Columbia operator's permit shall be required to maintain a valid permit at all times while operating a motor vehicle in the District of Columbia.

U. Use of Radar Equipment.

1. Only members who are trained and currently certified in the use of radar equipment shall be permitted to operate radar devices and issue radar speed NOI's.

2. Radar equipment shall be used only at those locations where the justification for its use can be demonstrated (e.g., locations where accidents occur frequently, school zones, or locations where speed is a contributing factor to accidents). Radar may also be used at locations selected at the discretion of a supervisory official.

3. When choosing a location to conduct radar speed measurements, members shall ensure that the flow of vehicular and pedestrian traffic will not be impeded or obstructed.

4. Members shall wear the visibility vest when operating radar equipment during hours of reduced visibility.

5. Members operating radar equipment are to complete a PD Form 715 (Radar Enforcement Record) for each location worked. This form shall be turned in at the end of the member's tour of duty.

6. When a member stops a vehicle and the operator has a device used to detect or counteract police radar in his/her possession, the member shall:

a. Issue the motorist a PD Form 61D (Violation Citation) and list the collateral as fifty ($50.00) dollars;

b. Confiscate the radar detection device;

c. Complete a PD Form 251 (Event Report) classifying the event as an incident for reporting purposes and include all pertinent facts surrounding the incident; and

d. Complete a PD Form 81 (Property Record) and place the radar detection device on the Property Book as evidence.

e. When collateral is posted and forfeited, the radar detector shall be released to the owner with specific instructions to immediately remove the device from the District of Columbia.

7. If the vehicle has a factory installed radar device mounted in the dashboard, the member shall make no attempt to seize the device or impound the vehicle. The member shall determine the device to be operational, issue the motorist a PD Form 61D, make note of the device's name, location, model and serial number for use in court.

Note: A motorist shall not be summarily arrested exclusively for possession of a radar detection device.

PART II

A. Station Clerks.

The original and one copy of PD Form 31 shall be forwarded to the Office of the Chief of Police no later than the following business day for transmittal to the Director, Department of Public Works (one copy shall be filed at the forwarding organizational element).

B. Traffic Enforcement Branch Personnel, Special Operations Division.

Upon being assigned a complaint by a citizen that a motorist has illegally passed a stopped school bus, the member shall:

1. Ensure that a PD Form 119 (Complaint/Witness Statement) has been completed, and that the statement includes:

a. The time, date, and place of the occurrence;

b. A description of the motorist, if possible; and

c. The complainant's signature.

2. Attempt to contact and interview the owner of the offending vehicle to determine the operator at the time of the occurrence. Once the operator of the offending vehicle has been identified, the member shall:

a. Interview the operator; and

b. Take appropriate enforcement action which may include issuing an NOI (A notation as to why the NOI was written, i.e., complaint, investigation, shall be made on the reverse side of copy "A" along with any other pertinent information).

PART III

A. Commanding Officer, Traffic Enforcement Branch, Special Operations Division.

1. The Commanding Officer, Traffic Enforcement Branch, Special Operations Division, shall coordinate and periodically meet with the district commanders relative to traffic problems within their respective districts with a view toward assuring the safe and efficient movement of traffic. More specifically, he/she shall:

a. Indicate the selective enforcement action needed to remedy the situation;

b. Provide operational support for district enforcement activities where special skills or specialized equipment are needed such as radar enforcement, investigation of serious accidents, etc;

c. Provide data on high accident frequency areas and causative violations to element commanding officers on a regular basis to assist in their selective enforcement efforts; and

d. Provide data comparing enforcement efforts to accident occurrence in relation to time, place, and violation.

2. Assign all complaints of motorists illegally passing a stopped school bus for further investigation.

B. District Commanders.

District Commanders shall:

1. Enforce all traffic regulations.

2. Ensure controlled and unobstructed traffic flow.

3. Monitor arterial roadways and bridges at all times with particular attention given during rush hour periods.

4. Ensure that only trained and currently certified members operate radar and issue Notices of Infraction for speeding violations.

5. Frequently consult with the Commanding Officer, Traffic Enforcement Branch relative to traffic conditions and enforcement efforts within their respective districts.

6. Submit a PD Form 107 (Outside Agency Report) to the Director, Department of Public Works, when traffic signs conflict or are obsolete.

7. Discuss the subject of courtesy at least once each week at roll calls (supervisors shall emphasize the need for courtesy at all times and shall take remedial action as necessary).

8. Ensure that 30% of all roll call training is traffic enforcement related.

9. Ensure that members of their command submit FL 140 (Monthly Report of Traffic Enforcement Activities) reports in an original and three (3) copies.

a. The original and two copies shall be forwarded to the Commander, Special Operations Division (so as to arrive no later than the fifth (5th) day of the following month); and

b. The third copy shall be retained in file at the originating element for one year.

10. Ensure that members of their command submit FL 140-A (Weekly Reports of Notices of Infraction) reports in an original and three (3) copies.

a. The original and two copies shall be forwarded to the Chief of Police, through the Patrol Operations Officer, so as to arrive no later than Tuesday of the following week; and

b. The third copy shall be retained in file at the originating element for one year.

C. Patrol Operations Officer.

The Patrol Operations Officer shall assume overall responsibility for traffic conditions within the District of Columbia.

Isaac Fulwood, Jr.

Isaac Fulwood, Jr.
Chief of Police

IF:RMD:jtp

No. 95-5841

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. WHREN, AND JAMES L. BROWN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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49 pp

QUESTION PRESENTED

Whether the stop of petitioners' vehicle after police officers observed the driver commit traffic violations violated the Fourth Amendment.

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OPINION BELOW

The opinion of the court of appeals (J.A. 6-19) is reported at 53 F.3d 371.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. A petition for rehearing was denied on July 13, 1995. J.A. 20. The petition for a writ of certiorari was filed on August 31, 1995. The petition for a writ of certiorari was granted on January 5, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of possessing crack cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possessing crack cocaine with the intent to distribute it within 1,000 feet of a school, in violation of 21 U.S.C. 860(a); possessing marijuana, in violation of 21 U.S.C. 844(a); and possessing phencyclidine (PCP), in violation of 21 U.S.C. 844(a). The district court sentenced each petitioner to a total of 168 months' imprisonment, to be followed by a ten-year period of supervised release. Petitioner Whren was also fined $8,800. The court of appeals affirmed petitioners' convictions, but remanded for resentencing. J.A. 6-19.

1. On the evening of June 10, 1993, several District of Columbia plainclothes police officers were patrolling in unmarked cars for drug activity in southeast Washington. J.A. 8. As the officers made a left turn, Officer Soto noticed a Nissan Pathfinder with temporary tags stopped at the intersection. He saw the driver, later identified as petitioner Brown, looking down into the lap of the passenger, petitioner Whren. Soto observed that the Pathfinder remained stopped

at the intersection for more than 20 seconds, obstructing at least one car that was stopped behind it. The officers made a U-turn to follow the Pathfinder. As they did so, petitioners turned without signalling and "sped off quickly" at an "unreasonable speed." *Ibid.*

The officers followed the Pathfinder until it stopped at another intersection, where it was largely boxed in by other cars in front of and behind it and to its right. J.A. 9. The officers pulled up next to the Pathfinder on the driver's side. Officer Soto then approached the driver's side of the Pathfinder, identified himself as a police officer, and told petitioner Brown to put the Pathfinder in park. As Soto was speaking, he saw that Whren was holding two large clear plastic bags of what appeared to be crack cocaine. Soto yelled "C.S.A." to alert the other officers that he had observed a Controlled Substances Act violation. As Soto reached for the driver's side door, petitioner Whren yelled, "pull off, pull off." Whren also pulled the cover from a power window control panel in the passenger door and put one of the large bags into a hidden compartment there. Soto opened the Pathfinder's door, dove across Brown, and grabbed the other bag from Whren's hand. Another officer pinned Brown to the back of the driver's seat. After arresting petitioners, the officers searched the Pathfinder and recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks, and a large white rock of crack cocaine from the hidden compartment in the car door, as well as numerous unused ziplock bags, a portable phone, and personal papers. *Id.* at 9-10.

2. Petitioners moved to suppress the evidence obtained from their car. J.A. 10. At the suppression

hearing, Officer Soto testified that he had stopped the Pathfinder because the driver was "not paying full time and attention to his driving." Soto testified that he had not intended to give the driver a ticket, but that he had wished to ask why the driver was obstructing traffic and why he had sped off, without signalling, in a school area. Soto testified that the decision to stop the Pathfinder was not based on petitioners' "racial profile," but on the driver's actions. The second officer's testimony essentially confirmed Soto's account. Petitioners argued that the officers' stated reasons for the stop were pretextual, and that the stop thus violated the Fourth Amendment because it was made without legally sufficient cause. *Id.* at 10-11.

The district court denied petitioners' motions to suppress. See J.A. 4-5. Although the court noted some minor discrepancies between the testimony of the two arresting officers, it explained that "the facts of the stop were not controverted," and that "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." Accepting Soto's testimony, the court concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence." *Id.* at 4-5, 10-11.

3. The court of appeals affirmed. J.A. 6-19. Under the Fourth Amendment, the court noted, a traffic stop is a "limited seizure" that must be justified by a showing of probable cause "or, ~~at~~ least, reasonable suspicion based on specific and articulable facts." *Id.* at 14. The court rejected petitioners' argument that, where such a showing has been made, a stop to investigate routine traffic violations is constitution-

ally permissible only if a reasonable police officer *would have* made the same stop in the absence of any other, constitutionally invalid purpose. *Id.* at 14-16. Instead, the court explicitly adopted the rule followed by a majority of other courts of appeals and held that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." *Id.* at 16. The court reasoned that inquiring into whether an officer lawfully "could have" made the traffic stop provides "a more principled method of determining reasonableness" than the "would have" test, because it eliminates any need for a court to inquire into an officer's subjective state of mind, *ibid.*, while at the same time it "provides a principled limitation on abuse of power" by requiring that a stop be supported by "probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts" (*id.* at 16-17).

Applying that standard to the facts of this case, the court of appeals concluded (J.A. 17-18) that Brown's failure to give "full time and attention" to his driving, his turning without signalling, and his driving away at an unreasonable speed provided the police with "the articulable and specific facts necessary to establish probable cause to stop" petitioners.[1] The court held

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[1] Petitioners' driving violated three District of Columbia municipal traffic regulations. First, D.C. Mun. Regs. tit. 18, § 2213.4 (1970), provides:

> An operator shall, when operating a vehicle, give full time and attention to the operation of the vehicle.

that it was irrelevant that the officers involved were vice officers who were patrolling for drug offenses, rather than traffic police.[2] The court explained that "whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop." *Id.* at 18.[3]

Second, D.C. Mun. Regs. tit. 18, § 2204.3 (1970), provides:

> No person shall turn any vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway without giving an appropriate signal in the manner provided in this chapter if any other traffic may be affected by the movement.

Finally, D.C. Mun. Regs. tit. 18, § 2200.3 provides:

> No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

[2] On appeal, petitioners relied in part on a local police regulation that provided in pertinent part that non-uniformed officers and officers in unmarked cars should not take traffic enforcement action "except in the case of a violation that is so grave as to pose an immediate threat to the safety of others." See District of Columbia Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (1986). While that general order had been superseded by the time the instant stop occurred, the successor general order is not materially different. See General Order 303.1(I)(A)(2)(a)(4) (1992) (officers not in uniform or in unmarked vehicles "may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others"). Pet. Br. App. 4a. Petitioners did not rely on the regulation at the suppression hearing, but did question officers about the regulation at trial. See Gov't C.A. Br. 22-23 n.12.

[3] The parties agreed below that 21 U.S.C. 841(a)(1), which proscribes possession of controlled substances with the intent to distribute, describes a lesser offense included within 21 U.S.C. 860(a), which prohibits the same act within 1,000 feet of a school. The court accordingly remanded the case for entry of an amended judgment vacating petitioners' convictions under Section 841(a)(1), and for resentencing on the remaining counts. J.A. 18-19. On remand, the district court vacated the convictions under Section 841(a)(1), and generally reimposed the original sentences on the remaining counts of conviction. The court, however, did not reimpose the $8,800 fine on petitioner Whren. Petitioners' appeals of their sentences on remand have been stayed pending the decision in this case.

SUMMARY OF ARGUMENT

The essential command of the Fourth Amendment is that searches and seizures be reasonable. The reasonableness requirement ordinarily mandates that a search or seizure be based on either probable cause or, in the case of a "investigative stop" that is more limited in scope and duration, reasonable suspicion that an offense has occurred or is occurring. When a police officer has observed a motorist commit a traffic offense, the officer has probable cause to justify a stop. Thus, it is reasonable under the Fourth Amendment for an officer who has observed a traffic offense to stop the automobile, to question the motorist, and to take other action where justified.

Petitioners argue that a traffic stop, even when supported by an observed violation, should nevertheless be held to violate the Fourth Amendment if the officer made the stop as a pretext to investigate the motorist for an offense unrelated to the traffic offense. As the courts of appeals have overwhelmingly recognized, any argument that would evaluate police action based on an officer's subjective motive conflicts with this Court's teaching that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's

actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985). In light of that principle, this Court has held that an officer's motives or intent are irrelevant in a variety of Fourth Amendment contexts. And, while the Court has in some settings required police conduct to conform to internal standards or routines to satisfy the Fourth Amendment, the need to observe such internal standards has been required as an *alternative* to a showing of individualized suspicion; it has never been applied as an *additional* requirement when the police have met the standard of probable cause or reasonable suspicion.

Petitioners accordingly disavow the suggestion that "pretext" stops should be evaluated by probing an officer's subjective intent. But the theoretically objective test of "pretext" they propose is equally flawed. Petitioners' test would invalidate a stop if a reasonable police officer "would not" have made it as a matter of departmental policy or practice. Such a supposed policy or practice, however, would often consist of nothing more than the amalgam of subjective views expressed by different police officers about what each regards as standard practice. And, since a "usual police practice" of not enforcing a particular violation does not alter the fact that the violation *is* illegal under the jurisdiction's traffic laws, it is difficult to see why an officer's departure from "usual practice" would be relevant to the legality of a stop at all *except* as a means for ferreting out an improper pretextual motive. In any event, petitioners' test would not produce consistent results. Identical stops would still yield different results

under the Fourth Amendment if they were made by officers whose police departments had different enforcement priorities.

There is no sound reason for requiring more than the usual Fourth Amendment showing of reasonable suspicion or probable cause in the context of traffic stops. A motorist who commits a traffic offense cannot ordinarily expect that law enforcement officers will overlook the violation, and the prospect of a traffic stop poses only a modest intrusion on the motorist's privacy interests. The Fourth Amendment requirement of reasonableness further limits the scope of permissible activity once the officer has made the stop. And it is unnecessary to alter established Fourth Amendment principles to prevent officers from selectively targeting motorists on account of their race, ethnicity, or exercise of protected rights, for such conduct is already unlawful under the Equal Protection Clause. As for petitioners' claim that the abundance of "technical" traffic regulations (Br. 13) affords too many opportunities for officers to enforce the law, that claim is properly addressed to the political branches that have designated such conduct as a traffic infraction.

Finally, petitioners' test of "pretext" is unworkable. While police departments may for their own purposes establish general policies and enforcement priorities, they rarely would issue a clear mandate never to enforce a particular violation. Courts would thus be obliged to evaluate what "usual practices" were, an inquiry that would often entail taking testimony from multiple officers in the department and then extrapolating from their experience to derive a general policy. And officers in the field, who must often make split-second judgments as to what

action to take, would be left to conjecture, after observing a traffic offense or offenses, whether stopping the motorist would later be held by a court to have conformed to internal regulations setting enforcement priorities or to "usual police practices." In light of those and other problems, the two circuit courts to apply petitioners' proposed test have, in practice, based their decisions on the state of mind of the individual officer who made the stop. Yet such an inquiry into an officer's state of mind is precisely what petitioners' "objective" test purports to avoid.

Petitioners' reliance on an internal police regulation as a gauge of "usual police practices" is particularly inappropriate in this case, because the regulation they cite merely allocates enforcement duties among members of the department. The department has made clear that it enforces the three traffic offenses that petitioners committed; the officers who made the stop were statutorily authorized to do so; and the identity of the particular officer who made the stop has no relation to the issue of whether the stop was justified. The proper inquiry is therefore simply whether the officer who made the stop knew of articulable facts that justified a belief that an offense had been committed. That test was met in this case.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A POLICE OFFICER WHO WITNESSES A TRAFFIC VIOLATION TO STOP THE MOTORIST'S VEHICLE

The essential requirement of the Fourth Amendment is that searches and seizures be reasonable. The reasonableness requirement ordinarily demands that a search or seizure be justified at its inception by a showing of probable cause, or, in the case of a more

limited "investigative stop," by reasonable suspicion, based on specific and articulable facts, that unlawful conduct has occurred or is occurring. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980) (per curiam); *Terry* v. *Ohio*, 392 U.S. 1 (1968). The scope of a search or seizure and the manner in which it is conducted must also be reasonable. *Terry*, 392 U.S. at 19-20; *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987); *Tennessee* v. *Garner*, 471 U.S. 1, 7-8 (1985); *Florida* v. *Royer*, 460 U.S. 491, 500 (1983).

As this Court has long held, those standards apply to a seizure that takes the form of a traffic stop of an automobile and the temporary detention of its occupants. Such a seizure may take the form of an investigative stop and thus may be initiated upon a showing of reasonable suspicion to believe that an offense has been committed. See, *e.g.*, *United States* v. *Hensley*, 469 U.S. 221, 226 (1985); *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1980); *Delaware* v. *Prouse*, 440 U.S. 648, 653-654, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-884 (1975).[4] Where an officer has observed a traffic viola-

[4] An automobile may also be stopped absent a showing of reasonable suspicion pursuant to a reasonable regulatory program under which the decision to make a stop is dictated by neutral criteria. *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). See *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 454-455 (1990) (upholding use of sobriety checkpoints); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976) (upholding checkpoint stops by Border Patrol to check for illegal aliens on roads leading from Mexican border); see also *Prouse*, 440 U.S. at 663 (invalidating discretionary stops of vehicles not based upon reasonable suspicion); *Brignoni-Ponce*, 422 U.S. at 882-884 (invalidating random stops near Mexican border not based on reasonable suspicion).

tion, the standard of probable cause is met. See, *e.g.*, *New York* v. *Class*, 475 U.S. 106, 117-118 (1986) (stop of car for speeding and cracked windshield); *id.* at 125 (opinion of Brennan, J.); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (stop of car bearing expired license tags); see also *Prouse*, 440 U.S. at 659; *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976).

Petitioners ask this Court to adopt an additional standard of justification that, apparently, would be unique to traffic-stop cases. They propose that a traffic stop based upon an observed traffic violation, even if reasonably limited in scope and manner, should nonetheless be held unreasonable where the stop was "pretextual" (Br. 15)—that is, motivated not by a desire to enforce the traffic laws, but by a desire to investigate the motorist for some other offense. They assert that pretext should be measured in light of whether a reasonable officer would have made the traffic stop in question, in the absence of suspicions of other wrongdoing. The Fourth Amendment, however, does not require a showing above and beyond probable cause or reasonable suspicion to justify a stop of a motorist for a traffic offense. Accordingly, and as a substantial majority of the courts of appeals have concluded, petitioners' proposed "pretext" rule should be rejected.[5]

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[5] Nine circuits have held that where an officer reasonably suspects or has probable cause to believe that a traffic offense has occurred or is occurring, the Fourth Amendment permits a traffic stop. See, *e.g.*, *United States* v. *Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991), cert. denied, 504 U.S. 924 (1992); *United States* v. *Scopo*, 19 F.3d 777, 782-784 (2d Cir.), cert. denied, 115 S. Ct. 207 (1994); *United States* v. *Johnson*, 63 F.3d 242, 245-247 (3d Cir. 1995), petition for cert. pending, No. 95-6724 (filed Nov. 13, 1995); *United States* v. *Jeffus*, 22 F.3d 554, 556-557 (4th Cir. 1994); *United States* v. *Causey*, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc); *United States* v. *Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); *United States* v. *Trigg*, 925 F.2d 1064, 1065 (7th Cir.), cert. denied, 502 U.S. 962 (1991); *United States* v. *Meyers*, 990 F.2d 1083, 1085 (8th Cir. 1993); *United States* v. *Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc) (overruling *United States* v. *Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988)), petition for cert. pending, No. 95-8121 (filed Mar. 1, 1996). The same approach has been taken by a number of state courts of last resort. See, *e.g. State* v. *Lopez*, 873 P.2d 1127, 1137 (Utah 1994) (collecting cases). The Ninth and Eleventh Circuits, however, have held that a stop is reasonable only where "under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.'" *United States* v. *Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991) (quoting *United States* v. *Smith*, 799 F.2d 704, 709 (11th Cir. 1986)); *United States* v. *Cannon*, 29 F.3d 472, 474-476 (9th Cir. 1994).

A. The Validity Of A Fourth Amendment Intrusion Is Properly Judged Against An Objective Standard Of Reasonableness, And Where A Search Or Seizure Is Supported By Probable Cause Or Reasonable Suspicion, There is No Basis For Inquiring Whether The Decision To Undertake The Search Conformed To Internal Police Practices

1. As this Court has consistently held, the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)). Based on that principle, the Court has held that an officer's motivation, intent, or under-

standing of the law is irrelevant in a variety of Fourth Amendment contexts. Those include the scope of a defendant's consent to a search, *Florida* v. *Jimeno*, 500 U.S. 248, 250-252 (1991); the scope of the "plain view" doctrine, *Horton* v. *California*, 496 U.S. 128, 138 (1990); the amount of force that may reasonably be used in making an arrest, *Graham* v. *Connor*, 490 U.S. 386, 397-399 (1989); the existence of a Fourth Amendment "seizure," *Macon*, 472 U.S. at 470-471; and the reasonableness of an officer's decision to board a vessel for document inspection, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). See *Terry*, 392 U.S. at 21 (in analyzing the reasonableness of a search or seizure, "it is imperative that the facts be judged against an objective standard").

Application of objective standards of conduct promotes the important interest in "evenhanded law enforcement." *Horton*, 496 U.S. at 138. The rights of persons subjected to identical official conduct should not turn on the happenstance of the state of mind of the officer. Because the ultimate Fourth Amendment question is whether the law enforcement interests at stake justify the particular intrusion on privacy interests, the subjective good faith or bad faith of the particular searching officer is not the proper test. Accordingly, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action so long as the circumstances, viewed objectively, justify that action." *Scott*, 436 U.S. at 138.

Measuring the validity of a search or seizure by an officer's subjective intent would lead to incongruous results. The traffic stop setting illustrates that

point. If two motorists are stopped in identical fashion for committing the same traffic offense, it would make little sense to judge the constitutionality of the stops differently because one officer's motives were proper and the other's were not. The objective approach that this Court has applied avoids such inconsistencies.[6]

2. There is no exception to the Fourth Amendment's focus exclusively on objective circumstances simply because a search or seizure is challenged as a "pretextual use of governmental authority." Pet. Br. 30. An inquiry into whether an officer's action was "pretextual" is inherently an inquiry into his subjective intent. See *Webster's Third New Int'l Dic-*

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[6] The Court explained that point in *Horton* v. *California*, *supra*, in rejecting the argument that the "plain view" doctrine should apply only to items that the officer did not expect to discover at the time he applied for a search warrant:

> "Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. The [inadvertence inquiry] would permit the seizure of only one of the photographs. But in terms of the 'minor' peril to Fourth Amendment values there is surely no difference between these two photographs: the interference with possession is the same in each case and the officers' appraisal of the photograph they expected to see is no less reliable than their judgment about the other. And in both situations the actual inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant."

496 U.S. at 139 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 516 (1971) (White, J., concurring in part and dissenting in part)).

tionary (1971) (defining "pretext" as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs"). Basing Fourth Amendment analysis on the presence or absence of an official motivation would interfere with the goal of evenhanded law enforcement, and it cannot be reconciled with this Court's cases. See *Graham*, 490 U.S. at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [action]; nor will an officer's good intentions make an objectively unreasonable [action] constitutional.").

3. There is also no requirement that an officer's actions must conform to internal police practices or protocols where the action is otherwise justified under normal Fourth Amendment principles. Petitioners assert (Br. 36) that "this Court's Fourth Amendment decisions have repeatedly turned on whether standard police procedures were followed." The decisions on which petitioners rely (Br. 30-36), however, principally involve administrative or regulatory searches. Such searches, unlike traffic stops based on observed violations of law, are not justified by articulable facts pertaining to the individual who is subjected to the search. The Court has accordingly held that the initiation and the conduct of such administrative searches must be governed by an external source of standards. See *Florida* v. *Wells*, 495 U.S. 1, 4 (1990) (property inventory procedures); *New York* v. *Burger*, 482 U.S. 691 (1987) (administrative searches of automobile junkyards); *Colorado* v. *Bertine*, 479 U.S. 367, 372 (1987) (property inventory procedures); see also automobile-stop cases cited at note 4, *supra*.

The application of standard procedures in the administrative-search setting avoids the risk of arbitrary police action, which is prevented in other Fourth Amendment contexts by the requirement of individualized suspicion before a search or seizure may be conducted. As the Court has observed, "[i]n those situations in which the balance of interests precludes insistence upon some quantum of individualized suspicion, other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979) (per curiam) (internal quotation marks and footnote omitted). The Court has not, however, extended the requirement of internal standards to Fourth Amendment settings in which the decision whether to proceed with a search *is* supported by probable cause or reasonable suspicion. Rather, "the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society's legitimate interests require the seizure of a particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations upon the conduct of individual officers." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979) (emphasis added). See 1 W. LaFave, *Search and Seizure* § 1.4(e), at 123 (3d ed. 1996) (noting that, in administrative search cases, the Court's inquiry into the use of standardized criteria was based upon "the fact that the enforcement activity in question was being permitted without probable cause focusing upon a particular individual or place," whereas in the

traffic stop situation, "the arrest or search *is* on probable cause").[7]

Petitioners also rely (Br. 33-34) on *United States* v. *Robinson*, 414 U.S. 218 (1973), but *Robinson* does not support a requirement that police must conform to standard internal practices as well as to Fourth Amendment norms. In *Robinson*, the police stopped an automobile whose driver lacked a permit, placed the driver under custodial arrest, and searched the driver's person incident to his arrest. The Court upheld all three actions. While the Court made clear that it had no occasion in *Robinson* to address the situation in which the decision to place a suspect in post-arrest custody "depart[ed] from established police department practice" and was instead "a mere pretext" to permit a search for narcotics incident to arrest, *id.* at 221 n.1, the Court did categorically hold that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment." *Id.* at 235. Significantly, the Court also held that a full search incident to a valid arrest is lawful *per se*, regardless of the subjective intent of the search officer. See *id.* at 236 ("it is of no moment that [the officer] did not indicate any sub-

[7] In urging that "this Court has often looked beyond the mere existence of probable cause in evaluating the reasonableness of searches and seizures" (Br. 16), petitioners rely on *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995), *Tennessee* v. *Garner*, 471 U.S. 1 (1985), *Winston* v. *Lee*, 470 U.S. 753 (1985), and *Welsh* v. *Wisconsin*, 466 U.S. 740, 754 (1984). Those cases, however, examined the reasonableness of the *manner* in which a properly justified search or seizure was executed. They have no bearing on the distinct question, presented here, of whether a justification beyond individualized suspicion is required to initiate the search or seizure in the first place.

jective fear of the respondent or that he did not himself suspect that respondent was armed").[8]

Gustafson v. *Florida*, 414 U.S. 260 (1973), the companion case to *Robinson*, further undermines the view that an officer's departure from departmental practice is relevant under the Fourth Amendment when a search is otherwise justified. The Court held that a search incident to a lawful arrest is valid even when the police department had "no police regulations which required the officer to take [the defendant] into custody [nor any] police department policies requiring full-scale body searches upon arrest in the field." *Id.* at 263. The existence of departmental policies and regulations, the Court stated, is not "determinative of the constitutional issue," because, under *Robinson*, "the arguable absence of 'evidentiary' purpose for a search incident to a lawful arrest is not controlling." *Id.* at 265.[9]

Finally, *Abel* v. *United States*, 362 U.S. 217 (1960), does not establish a general Fourth Amendment principle to require standard police practices. See Pet. Br. 33. In *Abel*, the Court held that evidence in-

[8] That portion of *Robinson* was cited by this Court in *Scott* v. *United States*, as demonstrating that searches are to be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Scott*, 436 U.S. at 138.

[9] Justice Powell's concurrence in *Robinson* and *Gustafson* noted that "*Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search undertaken for collateral objectives," *Robinson*, 414 U.S. at 438 n.2 (Powell, J.). No other Justice joined Justice Powell's opinion, however, and *Gustafson*'s unqualified holding makes clear that standard police practices are *not* required to justify a custodial arrest.

troduced at Abel's espionage trial had been lawfully obtained during a search incident to his administrative arrest. The arrest had been effected by the Immigration and Naturalization Service (INS) pursuant to an "administrative warrant" grounded on Able's status as a deportable alien. The Court noted that the Federal Bureau of Investigation (FBI) had alerted the INS to Abel's deportable status after it failed to verify its suspicions that Abel was engaged in espionage. 362 U.S. at 220-225. In upholding the arrest over Abel's claim that the arrest had been a "subterfuge" to assist the FBI in its investigation, the Court did emphasize that it was usual practice for the INS both to receive referrals from the FBI and to issue administrative warrants to deportable aliens, and that the INS had therefore acted in good faith, not for an "illegitimate purpose." *Id.* at 226-227. The Court's focus in *Abel* on the regularity of procedures attending the use of the administrative arrest warrant, however, is consistent with this Court's later decisions similarly requiring regularity of procedures to justify other administrative intrusions, see pp. 16-18, *supra*. And to the extent to that *Abel* suggested that subjective "bad faith" or "motive" alone could result in an infringement of Fourth Amendment rights, 362 U.S. at 226, that suggestion has not survived *Scott* and later decisions.[10]

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[10] The cases cited by amicus American Civil Liberties Union relies (Br. 7-8) are also inapposite. *Texas* v. *Brown*, 460 U.S. 730 (1983), upheld roadblock stops of cars not based on reasonable suspicion, despite the "generalized expectation" of officers that some cars would be found to contain narcotics and paraphernalia. *Id.* at 743 (plurality opinion). The plurality's statement about the absence of pretext (*id.* at 742) merely applied the then-extant "inadvertence" requirement of the plain view doctrine, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which was overruled by this Court in *Horton*, *supra*. See note 6, *supra*; *Brown*, 460 U.S. at 744 (opinion of White, J.). *Steagald* v. *United States*, 451 U.S. 204 (1981), held that officers may not use an arrest warrant to search the home of a third party without a search warrant for that home. While that rule was adopted in part to eliminate the possibility of pretextual use of an arrest warrant to enter homes that the officers lacked probable cause to search, *Steagald* did not countenance case-specific inquiries into police motivation nor require compliance with standard police procedures—other than the textual requirement of the Warrant Clause. See 451 U.S. at 215. *Jones* v. *United States*, 357 U.S. 493 (1958), held that a warrantless entry into a home to conduct a search is unlawful absent a recognized exception to the warrant requirement. The Court declined to consider the government's alternative theory on appeal, *i.e.*, that the search was a lawful incident to the defendant's lawful warrantless arrest, explaining that that theory was not supported by the testimony of the officers as to their purpose for entering the home. *Id.* at 499-500. The Court's statement is less an articulation of Fourth Amendment law than an explanation of why the Court declined to entertain the government's belated claim in *Jones*. Finally, none of these cases supports the ACLU's suggestion (Br. 18) that this Court should expressly permit an "inquiry into motive" in order to determine the "real reason officers act" in the course of a pretext inquiry.

B. A Traffic Stop Based On An Observed Violation Need Not Conform To Standard Police Practice To Satisfy The Fourth Amendment

Petitioners recognize (Br. 30) that an officer's subjective motivation cannot invalidate an otherwise objectively justified Fourth Amendment intrusion. As they concede, "[o]bjectively justified seizures are permissible under the Fourth Amendment without regard to the subjective motivations of the police." *Ibid.* In order to avoid directly asking courts to

inquire into subjective motive, petitioners endorse a pretext test that asks whether an officer's decision to make a stop deviated from the action that a "reasonable" officer, committed solely to enforcing the traffic laws, "would have" taken. Br. 32. They argue that stops are unreasonable "if they deviate so far from standard police practice that a reasonable officer in the same circumstances would not have made the intrusion on the basis asserted." *Ibid.*

Although that inquiry is nominally stated in objective terms, in practice it often would duplicate an inquiry into subjective intent. The "usual practices" of the "reasonable officer" would generally be "simply * * * an aggregation of the subjective intentions of officers in the regions." *United States* v. *Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993), cert. denied, 115 S. Ct. 97 (1994). And pretextual motive would simply be inferred circumstantially from the fact that the officer departed from usual practices of other officers. See *United States* v. *Johnson*, 63 F.3d 242, 247 (3d Cir. 1995); *United States* v. *Scopo*, 19 F.3d 777, 782 (2d Cir.), cert. denied, 115 S. Ct. 207 (1994). Indeed, it is not clear what relevance a departure from standard practices would have except to establish circumstantially the motives of the officer who initiated the search. An internal police policy to enforce a law only under certain circumstances does not modify a jurisdiction's traffic laws. Accordingly, an individual stopped for an infraction in derogation of "standard police practice" has still violated the law. The only conceivable purpose of considering a departure from standard police practice would be to ferret out circumstantially an improper pretextual motive.

In any event, to the extent that recourse to "usual practices" is designed to check arbitrary police ac-

tion, see, *e.g.*, LaFave, *supra*, § 1.4(e), at 124-125, the proposal is unsound. Inferring pretext from an officer's deviation from the traffic-enforcement protocol of his particular department would not eliminate arbitrary disparities. Even setting aside the practical obstacles that would generally attend an effort to establish "usual police practice," those practices would frequently differ precinct to precinct, department to department. Under a "usual practices" approach, a stop for a particular violation would be constitutional when carried out by an officer in a police department whose regular procedure was to enforce all observed traffic violations, but unconstitutional if carried out in identical fashion by an officer in an adjoining jurisdiction whose police department had more specific enforcement priorities. The exposure of a driver to a permissible stop for the identical infraction could change within seconds or minutes as the driver passed through different police jurisdictions. The constitutionality of a traffic stop, however, should not be "'subject to the vagaries of police departments' policies and procedures concerning the kinds of traffic offenses of which they ordinarily do or do not take note.'" *United States* v. *Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995) (en banc) (quoting *Ferguson*, 8 F.3d at 392), petition for cert. pending, No. 95-8121 (filed Mar. 1, 1996); *Scopo*, 19 F.3d at 784.

More fundamentally, it is not necessarily improper for officers, in deciding which traffic offenders to stop, to take into account "collateral" (Br. 38) law enforcement objectives beyond the fact that an offense has been committed. This Court has never held that —within the universe of searches, seizures, and arrests for which probable cause or reasonable suspicion exists—the Fourth Amendment restricts the

allocation of law enforcement resources. On the contrary, in deciding which valid searches, seizures, or arrests to undertake and which to forgo, officers routinely consider such legitimate "collateral" factors as: Is a suspect regarded as a danger to society? Is there a reason to suspect him of engaging in other crimes? Would a search or arrest have special deterrent value? The discretion accorded law enforcement officers among courses of action for which individualized justification exists reflects the fact that the Fourth Amendment's goal of protecting against arbitrary invasions of privacy is vindicated by the finding of probable cause or reasonable suspicion itself. See *Brown*, 443 U.S. at 51; *Prouse*, 440 U.S. at 661; *Brignoni-Ponce*, 422 U.S. at 883; *Terry*, 392 U.S. at 21; *United States* v. *Trigg*, 925 F.2d 1064, 1065 (7th Cir.), cert. denied, 502 U.S. 962 (1991).[11]

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[11] In the analogous setting of examining prosecutorial action, the Court has emphasized that law enforcement officials have "broad discretion," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), provided that charges are not brought on the basis of constitutionally impermissible factors such as race, religion, or the exercise of a legally protected right. *Id.* at 608. As the Court has noted, "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* at 607 (quoting *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978)); see 470 U.S. at 607 (prosecutorial charging decisions may be based, *inter alia*, on "the Government's enforcement priorities and the case's relationship to the Government's overall enforcement plan"); cf. *United States* v. *Choate*, 619 F.2d 21, 23 (9th Cir. 1980) ("It is not irrational in a world where resources do not permit prosecution of every suspected criminal that the government would give high priority to prosecuting those who, in addition to being suspected of tax evasion, were also suspected of other serious offenses.").

In this case, for example, petitioners surmise that the police officers who observed their three offenses were motivated by the belief that a glimpse into their car in the course of a stop might disclose proof of narcotics trafficking, as it in fact did. See Br. 4 (noting officer's testimony that officers were patrolling "a high drug area" with the objective of "find[ing] narcotics activity going on"). But, once reasonable suspicion of an offense existed, it would not have been unreasonable to act on that belief. On the contrary, it would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses. See *United States* v. *Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), cert. denied, 502 U.S. 962 (1991). Indeed, it may well be that, like a pedestrian drug courier, a motorist engaged in narcotics dealing is more prone than an innocent traveler to engage in "evasive and erratic" behavior that manifests itself in traffic infractions. See *Sokolow*, 490 U.S. at 8.

C. There Is No Need For A Heightened Fourth Amendment Standard Of Justification In Cases Involving Traffic Stops

Petitioners argue that a heightened Fourth Amendment standard is needed in the traffic-stop context because, they assert, without such a standard, police officers would be free, "despotically and capriciously" (Br. 17), to violate motorists' privacy. Petitioners' proposed departure from usual Fourth Amendment standards is not justified in this setting.

1. As this Court has repeatedly recognized in finding the reasonable suspicion standard applicable to traffic stops, a properly conducted traffic stop represents a relatively limited intrusion into privacy. "[T]he physical characteristics of an automobile and its use result in a lessened expectation of privacy therein." *New York* v. *Class*, 475 U.S. at 112. Moreover, because "automobiles are justifiably the subject of pervasive regulation by the State[,] [e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *Id.* at 113; see *California* v. *Carney*, 471 U.S. 386, 392 (1985) ("the public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation").

A motorist who commits a traffic infraction has even less of an expectation of privacy. See *Class*, 475 U.S. at 113. Motorists are aware that, "[a]s an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *Opperman*, 428 U.S. at 368. "The foremost method of enforcing traffic and vehicle safety regulations * * * is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day." *Prouse*, 440 U.S. at 659; *id.* at 658 (noting that States have a "vital interest" in enforcement of motor vehicle laws).

In addition, the Fourth Amendment's reasonableness requirement limits the actions an officer may take upon making a traffic stop. The officer is permitted to direct the motorist to exit the car, *Mimms*,

434 U.S. at 111 & n.6, to inspect the car's vehicle identification number, *Class*, 475 U.S. at 113-114, to inspect the motorist's license and registration, *Prouse*, 440 U.S. at 659, and to question the motorist in moderation about his identity, his license and registration, and the violation. *Berkemer* v. *McCarty*, 468 U.S. 420, 437, 439 & n.29 (1984). The officer may also observe items in plain view, as occurred in this case. But " 'the stop and inquiry must be reasonably related in scope to the justification for their initiation,' " *id.* at 439 (quoting *Brignoni-Ponce*, 422 U.S. at 881), and further significant intrusions require additional justification. See, *e.g.*, *United States* v. *Ross*, 456 U.S. 798, 808-809 (1982) (search of automobile and containers within it requires a showing of probable cause to believe that contraband may be found); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) (protective search of automobile for weapons requires a showing of reasonable suspicion); cf. *New York* v. *Belton*, 453 U.S. 454, 460-461 (1981) (search of passenger compartment for weapons may be made upon a probable-cause arrest of the occupants).[12]

2. Petitioners and their amici also assert (Br. 22-27; ACLU Br. 3-4, 8-9) that allowing traffic stops to proceed upon a showing of reasonable suspicion or probable cause alone would give officers "carte

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[12] This Court will examine one aspect of the Fourth Amendment's requirements in a traffic stop case next Term in *Ohio* v. *Robinette*, cert. granted, No. 95-891, (Mar. 4, 1996). The petition in that case presents the question whether the Fourth Amendment requires an officer who has validly stopped a motorist for a traffic stop to inform the motorist that he is free to leave before questioning by the officer, unrelated to the original traffic stop, may be found to be consensual. 95-891 Pet. at i.

blanche" (Br. 22) to detain and harass motorists on account of their race, ethnicity, or protected rights. Any decision to single out a suspect or suspects on the basis of such factors, however, would be unlawful under the Equal Protection Clause. See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886); *United States* v. *Travis*, 62 F.3d 170, 173 (6th Cir. 1995). As Chief Judge Newman of the Second Circuit has explained in holding that traffic stops based upon reasonable suspicion comport with the Fourth Amendment, "the Equal Protection Clause has sufficient vitality to curb most of the abuses that the [defendant] apprehends. Police officers who misuse the authority we approve today may expect to be defendants in civil suits seeking substantial damages for discriminatory enforcement of the law." *Scopo*, 19 F.3d at 786.

Indeed, this Court rejected a similar argument to petitioners' in *Terry* v. *Ohio*, *supra*. *Terry* recognized that minority groups had often claimed that some elements of the police harassed them during street stops. The Court held, however, that the existence of such abuses did not justify "a rigid and unthinking application of the exclusionary rule" to evidence obtained from such stops, for such a result "may exact a high toll in human injury and frustration of attempts to prevent crime." 392 U.S. at 15. Instead, the legality of a stop under the Fourth Amendment turned upon "objective evidentiary justification" for the particular stops. *Ibid.* The Court emphasized that its "approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inadequate." *Ibid.*

3. Finally, petitioners assert that an inquiry into pretext is needed to deny officers the discretion to stop motorists for "technical" (Br. 13) or "nitpicking" (Br. 20) traffic offenses. See Br. 13 ("a tire touching the shoulder stripe, a lane change signal a moment too brief"). That argument, at bottom, contests the decision by States and localities to designate such conduct as an enforceable infraction. The same argument could be made by defendants stopped or arrested for non-traffic offenses that they regard as trifling, such as various misdemeanors. If petitioners believe that the traffic laws in a jurisdiction punish inconsequential lapses, or that such misconduct should be enforced in a manner other than through traffic stops, their recourse is through the political process. See *Ferguson*, 8 F.3d at 391.[13]

D. A Standard That Turns On Whether A Reasonable Officer "Would Have" Made The Traffic Stop Is Not Workable

A final flaw in petitioners' proposed test of pretext is that it is unworkable. Petitioners would inquire whether a reasonable officer motivated solely by a desire to enforce the traffic laws "would have" made the stop—in other words, whether it was "usual practice" to make such a traffic stop. Br. 32. "Usual practice" would be determined with reference to internal police regulations governing the traffic

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[13] Compare C. Whitebread & C. Slobogin, *Criminal Procedure* § 6.02, at 168 & nn.8-9 (3d ed. 1993) (noting that, following the decisions in *Robinson*, *supra*, and *Gustafson*, *supra*, several state legislatures reduced certain violations of their traffic codes to infraction status, thus preventing operation of the search incident to arrest doctrine, which requires a custodial arrest).

offense, or, where no regulation existed, by determining what action a reasonable police officer would have taken under the circumstances. Br. 32-33, 41-42; ACLU Br. 15. As the courts of appeals have overwhelmingly concluded, see note 5, *supra*, that test is difficult to apply, produces inconsistent results, and provides uncertain guidance to officers in the field.

1. Petitioners' test of pretext would require, as a threshold inquiry, a determination of what "usual practices" were with regard to the traffic offense that supported the particular stop. That determination would presumably be made at the level of the police department (see Br. 41-42), because inquiring whether the officer had deviated from his own "usual practices" would entail exploring the officer's own subjective intent in making and forgoing stops for the same offense in the past, and because inquiring into police practices on a larger scale would both be impractical and at odds with the fact that traffic enforcement policies are generally set at the departmental level.

There is, however, no reason to assume that police departments commonly maintain regulations that direct that particular traffic laws either not be enforced or be enforced only under certain circumstances.[14] It is also unrealistic to assume, as petitioners appear to concede (Br. 24), that departments maintain records of how often the observation of a particular traffic offense results in a stop. Even if such records existed, it would be impossible to know what share of those stops had been influenced by

[14] Nor does petitioners' reliance on an internal police regulation in this case provide a workable solution to that problem. See pp. 36-38, *infra*.

"pretextual" motivations. Thus, except where an internal regulation clearly directed that an infraction not be enforced, a court seeking to determine a department's "usual practices" with regard to that infraction would either have to rely on the court's own notions of whether enforcement of a particular infraction would be reasonable, or receive testimony from other officers as to their usual practices with regard to the offense.[15]

Such an inquiry would not only be cumbersome, but, as an aggregation of the subjective intentions of multiple officers, it would be no more reliable than inquiring into the state of mind of a single officer.[16] Moreover, for such an exercise to have value, the court's inquiry would have to consider the circumstances under which the traffic offense occurred: Did weather, lighting, traffic, or road conditions render the offense more worthy of enforcement than in the typical case? It is unrealistic to expect such an analysis to be developed at a suppression hearing. Even if it were feasible to ascertain how often a department had enforced a particular traffic offense

[15] Even where a department had clearly directed officers not to enforce an offense, revelation of that enforcement policy could undermine police effectiveness in ensuring traffic safety. For example, disclosure of a policy of only stopping motorists who drive 10 miles per hour or more above the speed limit could undermine the speed limit's deterrent effect on motorists who exceed the speed limit by less than 10 miles per hour.

[16] As petitioners acknowledge (Br. 31), " '[s]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of resources' " (citation omitted). See LaFave, *supra*, §1.4(e), at 124 ("there is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive").

under similar circumstances, there is no ready guide to determine at what point the enforcement of that offense departed from "usual police practice." Suppose, for example, that a department stops motorists for a particular violation less than 50% of the time. Presumably, under petitioners' test, any stop for that offense is a deviation from the norm, and thus unconstitutional. The same result would follow even if the Fourth Amendment standard for a "usual" police practice were drawn at, for example, a 10% enforcement rate: any stop made by a police department that enforced a particular violation more rarely would be unlawful. Petitioners confine their discussion to the hypothetical situation in which an internal regulation categorically forbids enforcement (Br. 32, 41-42), and do not say, outside of that situation, what level of enforcement would make an otherwise lawful traffic stop "unusual."

Adoption of petitioners' test would therefore result in arbitrary disparities among subjects of searches and seizures. A traffic stop that was unconstitutional if made by one police department would be lawful if conducted by another, depending on internal regulations or the relative incidence of stops for that offense by the two departments. And a department that wished to minimize the possibility of having its traffic stops invalidated would be well-advised to dispense with internal prohibitions on enforcement altogether. See *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (declining to apply exclusionary rule to "every regulatory violation" because of the possibility that that sanction would have "a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures").

2. For officers in the field, who must often make split-second decisions as to what course of action to undertake, such a regime would be both unpredictable and confusing. Except where departmental regulations unambiguously mandated or forbade stops for a given traffic offense, officers would not know, when they see a violation, whether a court would later hold that stopping the motorist conformed to internal regulations or "usual police practices." To make the constitutionality of a stop turn on whether an officer has correctly analyzed how a potentially vague or general internal regulation applies to the situation at hand would "complicat[e] the thought processes and the on-the-scene judgments of police officers," who instead should be "free to follow their legitimate instincts when confronting situations presenting a danger to the public safety." *New York* v. *Quarles*, 467 U.S. 649, 659 (1984).

When an officer is free to initiate a traffic stop upon a showing of reasonable suspicion or probable cause, the officer is guided by a familiar standard that is ultimately subject to testing in court under a well-developed body of law. The officer knows that he must articulate specific facts to justify the intrusion in question. While it may be desirable for police departments to adopt additional regulations, either to promote regularity of action or to establish law enforcement priorities, such regulations, by themselves, normally afford no basis for the remedy of suppression of evidence in a criminal case. See *United States* v. *Caceres*, *supra* (refusing to suppress evidence obtained from consensual electronic surveillance, despite acknowledged violation of administrative regulations that mandated prior authorization by senior officials). When an officer has a basis to be-

lieve that a motorist has violated the traffic laws, the officer's misapplication of an internal regulation provides no justification for immunizing the motorist from criminal liability.

3. The unworkability of petitioners' "would have" test is illustrated by the experiences of the Ninth and Eleventh Circuits, the two circuits that presently apply that test. In practice, both circuits have based their decisions not on departmental regulations or enforcement patterns, but on the state of mind of the officer who made the stop. See, *e.g.*, *United States* v. *Cannon*, 29 F.3d 472, 476 (9th Cir. 1994) (upholding stop based on the fact that officer had been told by colleagues that defendant did not have a driver's license; no inquiry made into whether officers generally made stops for that offense); *United States* v. *Valdez*, 931 F.2d 1448, 1451 (11th Cir. 1991) (holding that stop was unreasonably pretextual based on testimony of patrol officer that he pulled over defendant for weaving into the emergency lane after being advised that narcotics unit wanted car stopped); *United States* v. *Smith*, 799 F.2d 704, 710 (11th Cir. 1986) (holding that stop was unreasonably pretextual based on evidence of officer's lack of interest in investigating drunk-driving charges). See *Ferguson*, 8 F.3d at 391. Yet consideration of a particular officer's subjective motivations is precisely what petitioners purport to avoid (Br. 32) by using an "objective" measure of pretext. If the departments whose officers made the stops at issue in *Valdez* and *Smith* "usually" enforced the laws against interlane weaving and drunk-driving, respectively, then under petitioner's "would have" test, those stops should have been upheld.

Based largely on such practical considerations, the en banc Tenth Circuit recently reconsidered the "would have" standard, which it had sought to apply in traffic stop cases between 1988 and 1995, and abandoned that standard. See *Botero-Ospina*, 71 F.3d at 787 (overruling *United States* v. *Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988)). The court noted that its application of the "would have" test had been "inconsistent and sporadic" and that that test had proven unworkable. 71 F.3d at 786. At times, the court observed, it had measured the stop against the practices of an entire State's police force, see *Guzman*, 864 F.2d at 1518) (New Mexico); at other times, against the practices of a particular unit within a state highway patrol, see *United States* v. *Fernandez*, 18 F.3d 874, 877 (10th Cir. 1994) (part of Utah Highway Patrol); and at still others, against the practices of the individual officer, see, *e.g.*, *United States* v. *Harris*, 995 F.2d 1004, 1006 (10th Cir. 1993). *Botero-Ospina*, 71 F.3d at 786. Moreover, the court found, the "would have" test had not invalidated any traffic stop that would have been sustained under the traditional inquiry into whether the stop was supported by reasonable suspicion. *Ibid.* The court accordingly held that a traffic stop may be initiated whenever an officer has reasonable suspicion to believe that a traffic or equipment violation has occurred or is occurring, and that it is irrelevant what the motives of the officer making the stop were or whether the stop departed from the department's "general practice" or the officer's routine. *Id.* at 787. The court emphasized that it was not "abandoning the traveling public to 'the arbitrary exercise of discretionary police power,'" because the officer's actions after making the stop must be "related in scope to the

circumstances that justified the interference in the first place." *Id.* at 786, 788 (citations omitted).[17]

4. Petitioners (Br. 41-42) and their amici (ACLU Br. 13-14) claim that "usual practices" would be determined in this case by applying an internal police department regulation, Metropolitan Police Department (MPD) General Order 303.1(I)(A)(2)(a)(4) (1992) (*reprinted* at Pet. Br. Add. 4). The regulation provides that, while "traffic enforcement action" may be taken by other police officers under any circumstances, *id.* at 303.1(I)(A)(2)(a)(1)-(3), such action should be taken by plainclothes officers in unmarked cars "only in the case of a violation that is so grave as to pose an *immediate* threat to the safety of others." *Id.* at 303.1(I)(A)(2)(a)(4).

As an initial matter, a general Fourth Amendment rule in this area should not turn on whether a particular police department has established written procedures to govern particular stops. But as this case illustrates, even such written procedures do not eliminate the malleability of the "usual practices" inquiry. Petitioners offer no reason why "usual police practice" should be determined with reference only to "officers out of uniform in unmarked cars" (Br. 41), rather than the entire police force. The department's regulation does not suggest, and petitioners do not assert, that the policy of the District of Columbia police department is not to enforce the

[17] The en banc Sixth Circuit had earlier adopted the same standard. *United States* v. *Ferguson*, *supra*. In doing so, the court noted that, although its prior decisions had purported to apply the "would have" test endorsed by petitioner, in reality those decisions had inquired only into whether the stop was supported by probable cause or reasonable suspicion. 8 F.3d at 390-391.

violations that petitioners committed. The regulations provide, in fact, to the contrary. See MPD General Order 303.1(III)(B)(1) ("District Commanders shall * * * enforce all traffic regulations."). Nor do petitioners dispute that the officers had statutory authority to make the stop. See D.C. Code Ann. § 23-581(a)(1)(B) (1981 & Supp. 1989) ("A law enforcement officer may arrest, without a warrant having previously been issued therefore[,] * * * a person who he has probable cause to believe has committed or is committing an offense in his presence.").

The regulation on which petitioners rely merely allocates enforcement duties among different officers. It sensibly directs plainclothes officers like Officer Soto not to divert from their important investigative duties except to enforce sufficiently serious traffic offenses. There is no reason why the stop of petitioners' vehicle should be deemed unlawful (and its fruits suppressed) because the officer who was present to observe the offenses was assigned to other enforcement duties. Indeed, under petitioners' analysis, identical stops of motorists for identical offenses would yield different results under the Fourth Amendment if made by officers in the *same* department, simply as a result of the officers' internally assigned responsibilities. See *Johnson*, 63 F.3d at 247 ("It is not apparent why police officers should be precluded from making an otherwise valid traffic stop merely because by doing so they would be departing from some routine"); *Scopo*, 19 F.3d at 783.[18]

[18] Moreover, although petitioners' "would have" test purports to be an objective gauge of "pretext," it would uphold a search by a District of Columbia traffic officer who freely

Furthermore, even if the regulation on which petitioners rely were dispositive of whether the stop conformed to "usual practices," use of that test would have forced Officer Soto to decide, on-the-spot, whether the violations that he had observed would later be held to have posed "an *immediate* threat to the safety of others," MPD General Order 303.1(I)(A)(2)(a)(4), knowing that a mistaken judgment on that issue would have led to the exclusion of evidence. We believe that an officer reasonably could have concluded that turning without signalling and driving at an unreasonable speed in a residential neighborhood at night, singly or together, constituted such a threat to safety. But whatever the proper application of that internal rule to the facts at hand, the risk of overdeterring officers from responding to observed offenses, and the cost of excluding probative evidence, far outweigh any benefit gained by using the Fourth Amendment to insist upon compliance with internal police protocol.

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admitted that he stopped a car out of a desire to search for narcotics, but it would invalidate an identical search by a undercover vice officer who was purely motivated by a desire to enforce the traffic laws. Compare *Graham*, 490 U.S. at 397; *Scott*, 436 U.S. at 138. Furthermore, it is clear that a District of Columbia narcotics officer could have stopped petitioners' car consistent with the internal regulations, provided that he was in uniform and in a marked police car. See MPD General Order 303.1(I)(A)(2)(a)(1) (1992) (Pet. Br. Add. 4). Thus, petitioners' approach of focusing their "usual practices" analysis on internal assignments within the department would fail to prevent "pretext" stops by some of the very officers whom petitioners would presumably surmise are most likely to be "pretextually" motivated.

E. The Stop Of Petitioners' Automobile Was Lawful, And The Search Was Reasonably Limited In Scope And Manner

In light of the foregoing, the initiation of the traffic stop in this case was reasonable within the meaning of the Fourth Amendment, because the officers had probable cause, based on their own observations, to believe that the driver of the Pathfinder had committed several traffic offenses. Petitioners appear to claim (Br. 44-46), however, that even if the stop itself was justified, it was carried out in an unreasonable manner because it was not conducted by traffic officers, but by plainclothes officers in an unmarked car. That claim lacks merit.[19]

We know of no case to hold unreasonable a stop of a motorist (or a pedestrian) based on reasonable suspicion or probable cause because the officers did not wear clothing or drive in a vehicle that identified them as police. On the contrary, common sense dictates that officers whose identity is not immediately apparent will be more efficacious in observing unlawful conduct in many situations, whether in patrol-

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[19] It also appears that petitioner's challenge to "*how* [the] seizure was made" (Br. 44) is not properly encompassed within the question presented by the petition for a writ of certiorari. That question is (Pet. i): "Whether a pretextual traffic stop undertaken by officers who were prohibited by police department regulations from making traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances *would have* made such a stop (the test used by the Ninth, Tenth, and Eleventh Circuits) or whether such a stop was permissible as long as it *could have* been made because of a traffic violation (the test used by the D.C. Circuit in this case, and the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits)."

ling roadways or walking the streets. See, *e.g.*, *Terry*, 392 U.S. at 5-7 (recounting how plainclothes officer observed suspects "case" store). *Prouse*, *supra*, and *Brignoni-Ponce*, *supra*, on which petitioners rely (Br. 44) are inapposite. Those cases invalidated random traffic stops that were not based on reasonable suspicion. While the Court noted that surprise traffic stops represent an intrusion on motorists' Fourth Amendment interests, see *Prouse*, 440 U.S. at 657, the Court emphasized that such traffic stops would have been lawful if made upon a showing of reason to believe "that a motorist is unlicensed * * * or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." *Prouse*, 440 U.S. at 663; *Brignoni-Ponce*, 422 U.S. at 882-884; see also note 4, *supra*. That showing was made in this case.

Also misplaced is petitioners' reliance (Br. 46) on *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995). In *Wilson*, this Court held that a police entry into a home to execute a search warrant may be unreasonable if not preceded by an announcement of police entry, based on the long common-law history of requiring police to "knock and announce" before entering a home. *Id.* at 1916. There is no common-law history requiring any form of pre-stop identification by police who stop automobiles, and as the Court has noted, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment was directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (warrantless entries into the home are prohibited by the

Fourth Amendment absent probable cause and exigent circumstances).[20]

Even if there were some requirement of pre-stop notification of the officers' status, it was established at the suppression hearing that Officer Soto was wearing an orange police armband and a badge, and that he identified himself as a police officer as he approached petitioners' car. Tr. 13-14. The intrusion on petitioners' privacy that followed "was limited and was 'reasonably related in scope to the justification for [its] inception.'" *Cortez*, 449 U.S. at 421 (quoting *Terry*, 392 U.S. at 29)). Officer Soto remained outside the car until he observed cocaine in the front seat, compare *Cortez*, 449 U.S. at 421, and that observation fully justified his entry into the vehicle to retrieve the cocaine and to apprehend petitioners. Compare *United States* v. *Hassan El*, 5 F.3d 726, 731 (4th Cir. 1993).

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[20] For similar reasons, *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984), on which petitioners also rely (Br. 16, 40), is inapposite. *Welsh* held that officers may not rely on the doctrine of exigent circumstances to enter a home at night without a warrant to make an arrest for a minor traffic offense. As the Court emphasized in *Welsh*, its decision turned on the "special protection afforded the individual in his home under the Fourth Amendment," 466 U.S. at 754, a factor absent here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1996

(8)

No. 95-5841

In The

Supreme Court of the United States

October Term, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

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SUMMARY OF ARGUMENT

The government does not contest the fundamental premise of petitioners' argument – that *in the unique context of civil traffic regulations,* allowing mere observation of an infraction automatically to justify a stop places no effective limit on the discretion of the police. Such unbridled discretion is unacceptable under the Fourth Amendment. In other settings in which reliance on probable cause has been found impracticable, the Court has relied on compliance with standard procedures as an alternative safeguard against arbitrary searches and seizures. Although the Court has never before confronted the novel problem raised by this case (probable cause providing an inadequate check on officer discretion), it makes sense to turn to the same solution the Court has used to solve the analogous problem of how to limit discretion in those cases in which the Fourth Amendment balance "precludes insistence upon . . . individualized suspicion," *Delaware v. Prouse,* 440 U.S. 648, 654-655 (1979). By requiring the police to exercise their discretion in civil traffic enforcement pursuant to a consistent standard – set either by their own internal regulations or, at a minimum, by their own routine practices – the "reasonable officer would have" standard is a workable solution to a problem that undermines the privacy and security of every motorist in this country.

ARGUMENT

I. BECAUSE MERE OBSERVATION OF A CIVIL TRAFFIC INFRACTION DOES NOT LIMIT OFFICIAL DISCRETION IN DECIDING WHICH MOTORISTS TO SEIZE, THE FOURTH AMENDMENT'S REASONABLENESS REQUIREMENT COMPELS CONFORMANCE TO STANDARD POLICE PROCEDURES.

A. The Government Does Not Dispute That Pervasive Traffic Regulations Confer Unbridled Authority On Police And Create Opportunities For Pretextual Seizures.

The government does not dispute petitioners' description of the reality of traffic enforcement and, in particular, pretextual traffic enforcement. The government effectively concedes that the pervasiveness of minor civil traffic offenses (such as the "full time and attention" offense in this case) allows the police to establish "probable cause" of a "violation" by any motorist at any time (Pet. Br. 17-21). *See also Morrison v. Olson*, 487 U.S. 654, 727-728 (1988) (Scalia, J., dissenting) (" 'We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning' ") (quoting address by then-Attorney General Robert Jackson to Conference of United States Attorneys, April 1, 1940).

Nor does the government deny that the broad discretion conferred by civil traffic laws creates a temptation to use those laws as pretexts to evade Fourth Amendment requirements, that police routinely yield to that temptation, and that they do so disproportionately against racial minorities (Pet. Br. 21-29). Given the evidence set out in our opening brief, it is little wonder that "[t]here's a moving violation that many African-Americans know as

D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, The New Yorker 56, 59 (Oct. 23, 1995). *See also* Michael A. Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, The Washington Post, Mar. 28, 1996, at A1 (reporting inordinate numbers of traffic stops experienced by several prominent black men and their "strategy for dealing with DWB"). Unfortunately for the thousands of innocent motorists arbitrarily singled out for investigation, the hunches on which the police rely are overwhelmingly wrong (Pet. Br. 25 & n.21).

The government disputes none of this. The government merely argues that none of this matters – that probable cause is probable cause, and that "probable cause" *per se* equals "reasonable seizure," even if the probable cause is of a minor civil traffic infraction for which a reasonable officer would not make a seizure. Far from denying that pretextual traffic stops are epidemic, the government argues that they are a *good* thing (Govt. Br. 23, 25):

> [I]t is not necessarily improper for officers, in deciding which traffic offenders to stop, to take into account "collateral" (Br. 38) law enforcement objectives beyond the fact that an offense has been committed. . . . On the contrary, it would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses.

The government's analogy to prosecutorial discretion (Govt. Br. 24 n.11) is misplaced. The government argues that this Court has upheld charging decisions as long as the prosecutor has probable cause and the decision was not based on constitutionally impermissible factors such as race or religion. But the government overlooks that when police

officers make seizures, they are subject to an additional constitutional constraint not applicable to prosecutors: the Fourth Amendment requirement of "reasonableness."

The government's argument that "in deciding which valid searches, seizures, or arrests to undertake and which to forgo, officers routinely consider . . . legitimate 'collateral' factors" (Govt. Br. 24) begs the very question in this case: whether the police have a "valid" basis for action where a reasonable officer in the same circumstances would not act on that basis. If the floor for establishing a "valid" ground to stop is set so low that it includes grounds upon which a reasonable officer would not rely, the independently inadequate (and thus *illegitimate*) "collateral" motive becomes, objectively viewed, the operative reason for a stop that would not otherwise have been made by a reasonable officer. The government not only rejects inquiry into the subjectively pretextual motives of individual officers in particular cases (as do petitioners), but also seeks endorsement of a patently sham system that affirmatively encourages *objectively pretextual* traffic stops.[1]

The government advocates complete police discretion within "the universe of searches, seizures, and arrests for which probable cause or reasonable suspicion exists" (Govt. Br. 23), while not disputing that, in the unique context of civil traffic regulations, that "universe"

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[1] Petitioners agree that courts should not inquire into whether a particular officer's actions were subjectively "pretextual" (Govt. Br. 13-16). But the "reasonable officer would have" standard allows courts to find police action "objectively pretextual" in the same sense this Court has recognized that courts can find an officer's action to have been undertaken in "*objective* 'good faith,' " *Graham v. Connor*, 490 U.S. 386, 399 n.12 (1989) (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

includes all motorists. In asking this Court to endorse a system whereby police focus on those "observed traffic offenders" the police "suspect" may be involved in criminal activity (Govt. Br. 25), the government is really asking the Court to allow officers to play their hunches against everyone who gets behind the wheel. This Court's decision in *Prouse* says that is impermissible.

B. Requiring Conformance To Standard Procedures Is An Appropriate Alternative Means Of Constraining Police Discretion In These Unique Circumstances.

The government acknowledges that this Court has in some cases "required police conduct to conform to internal standards or routines to satisfy the Fourth Amendment" (Govt. Br. 8) and that the application of standard procedures in those settings "avoids the risk of arbitrary police action" (Govt. Br. 17). The government argues, however, that such conformance has been required only as an alternative to a showing of individualized suspicion, never as an addition to probable cause or reasonable suspicion (Govt. Br. 8, 16-17). But if "a showing of individualized suspicion is not a constitutional floor, below which a search or seizure must be presumed unreasonable," *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 624 (1989), neither is it a floor *above* which a search or seizure must be presumed reasonable. The Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Winston v. Lee*, 470 U.S. 753 (1985), confirm that probable cause alone does not necessarily make a search or seizure objectively reasonable.

The ultimate constitutional question – objective reasonableness – "depends ' "on a balance between the public interest and the individual's right to personal security

free from arbitrary interference by law officers." ' " *Brown v. Texas*, 443 U.S. 47, 50 (1979) (citations omitted). A "central concern" in striking this balance "has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* at 51.

> To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Id. The government emphasizes the "or" and argues that because the first requirement is met here, there is no basis for imposing the second (Govt. Br. 17). However, observation of a civil traffic infraction does not *automatically* establish "that society's legitimate interests require the seizure of the particular individual" (*Brown*, 443 U.S. at 51). Indeed, because such offenses can be detected in the conduct of just about everyone, they do not in fact identify those "particular individual[s]" whose seizure is "require[d]" by society's interests.[2] It is therefore consistent with Fourth Amendment precedent to turn to this Court's alternative means of constraining discretion –

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[2] The traffic regulations relied upon by the police in this case were promulgated not to define criminal conduct, but as part of a scheme designed to regulate in hypertechnical detail every conceivable aspect of motor vehicle use in the District of Columbia. It is therefore not surprising that, when combined with the traditional criminal probable cause standard, they confer a degree of discretion far beyond that normally available to the police in enforcing the criminal laws.

requiring compliance with "standardized criteria" or "established routine," *Florida v. Wells*, 495 U.S. 1, 4 (1990).

Conceptually, this case is analogous to the "special needs" cases. Where the government has shown "special needs, beyond the normal need for law enforcement," this Court has dispensed with the probable cause requirement if the balance of government and privacy interests shows it to be "impracticable." *Skinner*, 489 U.S. at 619.

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Id. at 624. This case presents the reverse situation: the sweeping discretion available to police under the civil traffic code and the documented use of that discretion to make pretextual seizures makes probable cause an impracticable means of guaranteeing an objectively reasonable seizure. *Cf. South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976) (probable cause "unhelpful" in inventory context because "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures"). The governmental interest in the seizures at issue is minimal (since, by definition, the "reasonable officer would have" test addresses only those infractions the government does not normally act upon) and the important privacy interest in avoiding arbitrary seizures is placed in jeopardy by reliance on probable cause alone. Although the problem is different than in the Court's "special needs" cases, the solution is the same:

reliance on standard procedures to ensure against arbitrary exercise of official discretion.[3]

C. The Government's Proposed Solutions To The Pretextual Traffic Stop Problem Are Ineffective.

1. The Equal Protection Clause

The government's reliance on the Equal Protection Clause as the answer to the pretextual traffic stop problem is misplaced. First, of course, the fact that an "unreasonable" police seizure might in some circumstances violate the Equal Protection Clause does not mean it does not also violate the Fourth Amendment.

Second, the Equal Protection Clause cannot be relied upon to curb the systemic abuses petitioners have documented. *See generally* 2 W. LaFave & J. Israel, *Criminal Procedure* § 13.4 at 185-203 (1984) (discussing heavy burden facing discriminatory enforcement claimants and problems of proof in establishing such a claim under Equal Protection Clause). An equal protection claim in the selective traffic enforcement setting would require determination of the very subjective intent of the officer

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[3] The government understates the importance of *Abel v. United States*, 362 U.S. 217 (1960), in pointing the way to such a solution. *Abel* is highly significant because, in the face of a claim that an administrative power was being used as a pretext for criminal law enforcement, and *despite the existence of individualized suspicion that Abel was a deportable alien*, this Court "focus[ed] . . . on the regularity of procedures" (Govt. Br. 20) in upholding the agency action. Likewise, this Court's reliance on the absence of any "departure from established police department practice" in putting aside the pretext claim in *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973), is significant given that the police clearly had probable cause of a *criminal* violation in that case.

that the government agrees is so difficult to establish (Govt. Br. 31 & n.16). Any individual motorist, such as the priest stopped on the New Jersey Turnpike (*see* Pet. Br. 47), might have a "gut instinct" that his race played a role in his stop, but would be hard-pressed to gather even the minimal amount of information needed under FED. R. CIV. P. 11 to file a complaint. Even if the claim survived Rule 11, the kind of data required to prove intentional discrimination is not generally available. *See United States v. Travis*, 62 F.3d 170, 175 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 738 (1996).

In sum, even if the scope of the Equal Protection Clause were relevant in determining what is "reasonable" under the Fourth Amendment, it cannot be counted on to deter the kind of arbitrary traffic enforcement policies encouraged by the "could have" test. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), has been on the books for over 100 years but, as the evidence in our opening brief shows, it has obviously had little, if any, impact on traffic stops. Application of the traditional *Terry*-type "reasonable officer" standard, on the other hand, would go a long way toward deterring officers who are inclined to use the civil traffic code to play out their subjective hunches against motorists whose conduct would not normally result in an intrusion.

2. The "Scope" of Traffic Stops

The government suggests that because "'"the stop and inquiry must be reasonably related in scope to the justification for their initiation"'" (Govt. Br. 27) (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)), there is no need to restrict the authority to make a traffic stop to those a reasonable officer would have made. But whatever the Fourth Amendment limits on the scope of the intrusion

following a stop for a traffic violation may be, they cannot undo the harm to a motorist's privacy interests caused by the stop itself. This Court in *Prouse* held that a traffic stop is a significant enough intrusion that it cannot be made at the unfettered discretion of officers in the field.

Moreover, any limits this Court has placed on the scope of a *Terry* stop are not relevant since most traffic stops are made upon an observed infraction and are not investigatory *Terry* stops. A "traffic stop supported by probable cause" may "exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984). The scope of a traffic stop is broad enough, in any event, to provide plenty of incentive for pretextual stops. At a minimum, a legitimate traffic stop includes detention of the motorist for a reasonable period "while the officer checks his license and registration." *Id.* at 437. Assuming the stop itself is valid, an officer will always be free to use the time he is waiting for a response from dispatch to request consent to search, or to subject the motorist and his car to a sniff by a drug-sniffing dog, without exceeding the "scope" of the stop. In a recent Sixth Circuit case, an Ohio State Highway Patrol Trooper "testified that as part of his drug interdiction unit's investigative method, he 'automatically' uses [his dog] to perform a narcotics sniff on every vehicle his unit stops." *United States v. Buchanon*, 72 F.3d 1217, 1228 (6th Cir. 1995).

3. Recourse To The Political Branches

The government suggests that petitioners' claim for relief from the excessive discretion conferred on police under the civil traffic code should be "addressed to the political branches" (Govt. Br. 9, 29). But this Court has

never hesitated to impose a judicial remedy when a legislature has vested excessive discretion in the hands of the police. *See Kolender v. Lawson*, 461 U.S. 352 (1983) (loitering statute unconstitutionally vague under Due Process Clause). Fourth Amendment limits are not defined by the political branches. The political solution would make sense only if, contrary to society's expectations, the technical traffic regulations that create the pretext problem were strictly enforced across the board. But, by definition, the "would have" test addresses stops for violations that reasonable officers would generally ignore. It is precisely because the political majority cannot be counted on to resist overinclusive laws that are enforced only against the *few* that the problem of arbitrary enforcement requires a judicial remedy. "[N]othing opens the door to arbitrary action so effectively as to allow [municipal] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

II. THE "REASONABLE OFFICER WOULD HAVE" INQUIRY IS THE SAME WORKABLE STANDARD ROUTINELY APPLIED BY TRIAL JUDGES UNDER *TERRY V. OHIO*.

The government argues that the "would have" test is "unworkable" (Govt. Br. 9-10, 29-38). But the inquiry petitioners propose is no different from that made every day by judges facing Fourth Amendment challenges to *Terry* stops: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was

appropriate?" *Terry*, 392 U.S. at 21-22. *See United States v. Botero-Ospina*, 71 F.3d 783, 790 (10th Cir. 1995) (*en banc*) (Seymour, C.J., dissenting), *petition for cert. pending*, No. 95-8121 (filed Mar. 1, 1996); *id.* at 796 (Lucero, J., dissenting).

This Court has always accepted that " '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.' " *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation omitted). "What is reasonable . . . 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' " *Skinner*, 489 U.S. at 619 (citation omitted). A test that asks whether a reasonable officer in the circumstances would have taken a particular action is no more "unworkable" than other "reasonable officer" inquiries prescribed by this Court. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (scope of consent is determined by asking "whether it is reasonable for an officer to consider a suspect's [statements of consent] to include consent to [make the search at issue]"); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (qualified immunity depends on "whether the actions [allegedly] taken are actions that a reasonable officer could have believed lawful"); *Illinois v. Krull*, 480 U.S. 340, 355 (1987) (asking whether "reasonable officer should have known that the statute was unconstitutional"); *United States v. Leon*, 468 U.S. 897, 919-920 (1984) ("where the officer's conduct is objectively reasonable, ' . . . the officer is acting as a reasonable officer would and should act in similar circumstances.' ") (citation omitted).

A. As Always, The "Reasonable Officer" Is A Reasonable Officer In The Circumstances Of The Officer Who Made The Intrusion.

The government suggests that even if the policy and practice of the police are relevant, there is no reason for the reference point to be officers in the circumstances of Officers Soto and Littlejohn, *i.e.*, out of uniform and in unmarked cars, rather than "the entire police force" (Govt. Br. 36-37). But Fourth Amendment reasonableness depends on an "objective assessment of the officer's actions in light of the facts and circumstances *confronting him at the time.*" *Scott v. United States*, 436 U.S. 128, 136 (1978) (emphasis added). Petitioners' test therefore asks whether a reasonable officer *in the circumstances of the officer who made the stop* would have made it, not whether a reasonable officer in some other hypothetical circumstances theoretically could have made the stop. In *Graham*, 490 U.S. at 396, this Court made clear that "[t]he reasonableness of a particular use of force [under the Fourth Amendment] must be judged *from the perspective of a reasonable officer on the scene . . . .* " (emphasis added). The "man of reasonable caution" considered in *Terry*, 392 U.S. at 22, is a prudent police officer in the shoes of the officer making the search or seizure. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). Likewise, the classic "reasonable person" in tort law means a reasonable person with the same physical attributes and professional knowledge and experience as the defendant. *See* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on Torts* § 32 at 175-176, 185 (5th ed. 1984).[4]

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[4] The government attempts to shift this Court's focus from the fact that this seizure was made with an unmarked car by

B. The "Reasonable Officer" Standard Will Not Hinder Traffic Enforcement By Officers In The Field.

The government argues that the "would have" test will confuse officers in the field, whose "split-second" decisions (Govt. Br. 9, 33) will be hindered by uncertainty as to whether a court would later find that a reasonable officer would have made a particular traffic stop on the basis asserted.

First, under the "reasonable officer would have" test, any officer who witnesses a traffic violation that he genuinely believes warrants enforcement action will not have to think even a moment about the constitutionality of stopping the motorist's car. It would be the truly rare case in which a traffic stop that was in fact motivated by

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urging the Court to separate the *manner* in which this seizure was made from the seizure itself (Govt. Br. 18 n.7, 39-41 & n.19). But "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.' " *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8-9). Likewise, the government's attempt to dismiss the unmarked car regulation as "merely allocat[ing] enforcement duties among different officers" (Govt. Br. 37) fails. The regulation at issue in fact withdraws *authority* to enforce from officers out of uniform or in unmarked cars except in the most exigent of circumstances. The safety concerns behind this regulation are apparent. *Cf.* U.S. Dept. of Transportation, *A Manual of Model Police Traffic Services – Policies and Procedures* § 2.5 at 109-110 (Jan. 1986) (model regulations of International Association of Chiefs of Police allow use of unmarked cars for traffic enforcement only if specifically authorized in connection with "special enforcement needs" and if "equipped with both emergency lights and siren"). The unmarked car that stopped the Pathfinder in this case was not equipped with any emergency lights or sirens (Tr. 177-178).

traffic concerns would fail the "would have" test.[5] Only an officer using a minor traffic infraction as a pretext to investigate some subjective hunch would have to ask himself what a reasonable officer would do in light of the facts and circumstances confronting him – an inquiry no different from that necessary in every *Terry* stop. Since such an officer has already gone through the rather complex mental process of realizing he has a hunch that does not meet the *Terry* test, and deciding to look for a traffic infraction to provide Fourth Amendment justification for a stop, the government can hardly criticize the "would have" test on the ground that it " 'complicat[es] the thought processes . . . of police officers' " (Govt. Br. 33) (quoting *New York v. Quarles*, 467 U.S. 649, 659 (1984)).[6]

Second, application of the exclusionary rule in these circumstances does not risk "overdeterring officers from responding to observed offenses" (Govt. Br. 38). An officer making an ordinary traffic stop would have no concern with the exclusionary rule because he would not expect it to yield the kind of "fruit" that he would want

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[5] It is *theoretically* possible that an "unreasonable" but well-intentioned police officer could make a stop for traffic-related reasons that deviated sufficiently from the enforcement practices of his department that it would fail the "reasonable officer would have" test. This should not trouble the Court. Subjective good faith has never been determinative of reasonableness. *Graham*, 490 U.S. at 397; *Terry*, 392 U.S. at 22.

[6] The government is unnecessarily alarmist when it suggests that petitioners' test would somehow prevent officers from "'follow[ing] their legitimate instincts when confronting situations presenting a danger to the public safety.' " *Id.* Clearly, *any* traffic violation "presenting a danger to the public safety" as this Court used that phrase in *Quarles*, would objectively justify a traffic stop under the "would have" test, no matter what the officer's actual motivation.

to use in court; having witnessed the infraction, the officer already has all the evidence he needs to obtain a civil adjudication. Therefore, the only officers the exclusionary rule would "deter" would be those improperly using the traffic laws to make stops that would not normally be made but in which the officer has a subjective hope of finding evidence of crime. This Court has repeatedly condemned such pretextual government action (*see* Pet. Br. 30, 33-34) and should not hesitate to adopt a standard that will deter it. *See* Govt. Br. 21 n.10 (acknowledging that "th[e] rule [in *Steagald v. United States*, 451 U.S. 204 (1981)] was adopted in part to eliminate the possibility of pretextual use of an arrest warrant").

C. The "Reasonable Officer" Standard Will Encourage Police Rulemaking.

The government is wrong that, under a "reasonable officer would have" standard, police departments "would be well-advised to dispense with internal prohibitions on enforcement altogether" (Govt. Br. 32). Under the "reasonable officer would have" standard, the choice for police departments is not between having every stop upheld if they do not adopt regulations, and having some stops struck down if they do adopt regulations. Because of the inherently selective nature of traffic law enforcement, individual officers will always make *some* arbitrary stops in the absence of regulations guiding their discretion. Discretion-limiting regulations, however, avoid *ad hoc* judicial inquiries into police practices and make stops undertaken in conformance with such regulations presumptively reasonable. Moreover, such regulations actually reduce the number of unreasonable stops by giving officers concrete standards to help them exercise their discretion. Therefore, under a "reasonable officer would

have" standard, police departments will have an incentive to engage in the sort of self-regulation this Court has recognized as desirable. *See United States v. Caceres*, 440 U.S. 741, 755 & n.23 (1979).[7] *See also* Kenneth Culp Davis, *Police Discretion* (1975).

D. The "Reasonable Officer" Standard Will Not Be Cumbersome To Apply.

The government argues that, absent a police regulation to guide the "reasonable officer" inquiry, a court seeking to determine what reasonable conduct would be for an officer in the stopping officer's circumstances "would either have to rely on the court's own notions of whether enforcement of a particular infraction would be reasonable, or receive testimony from other officers as to their usual practices with regard to the offense" (Govt. Br.

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[7] The holding in *Caceres* has no applicability to this case. In *Caceres*, this Court made clear that the defendants had *no reasonable expectation of privacy* in the conversations being recorded in violation of IRS regulations. 440 U.S. at 750. Therefore, the Fourth Amendment reasonableness requirement was simply not implicated. Indeed, the Court found that the particular violations at issue did "not raise *any* constitutional questions." *Id.* at 750-751 (emphasis added). The *Caceres* Court merely rejected "a rigid application of an exclusionary rule to every [police or prosecutorial] regulatory violation." *Id.* at 755. The Court never suggested that violation of a police regulation would not be relevant to the "reasonableness" of police conduct under the Fourth Amendment. Petitioners do not contend that the violation of a regulation will always be dispositive of the reasonableness inquiry. The "would have" standard permits any traffic stop a reasonable officer would have made. All of the circumstances, including "vague or general" department policies (Govt. Br. 33), will be viewed through the eyes of a reasonable officer on the scene, not "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

31). The government exaggerates the difficulties of such an inquiry.

First, even if some lower courts purporting to apply the "reasonable officer would have" test have not always done so consistently, and have, on occasion, slipped into a consideration of the subjective motives of the individual officer (Govt. Br. 34-35), that does not mean that the standard itself is inherently unworkable. There is no reason to believe that, with proper guidance from this Court, lower courts cannot consistently and objectively apply a traditional "reasonable officer" standard in this context.

Second, it is not unrealistic to expect that a court will be able to develop the facts necessary to apply the "reasonable officer would have" standard in the course of an ordinary suppression hearing. The officer who made the stop is competent to testify to any relevant written or oral policies.[8] He is also competent to testify as to his own practice in similar circumstances, and that of others to the extent he knows it. It is a simple matter to ask the officer how often he sees a car, for example, exceed the speed limit by two miles per hour under similar conditions, and how often he stops such cars. If the officer sees 100 such violations per day but has stopped only two motorists for that violation in the past month, the court will probably not require any additional information. The government

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[8] In the District of Columbia, for example, District Commanders must consult with the Commanding Officer of the Traffic Enforcement Branch to develop selective enforcement policies for their districts, which are then implemented by the patrol officers. MPD General Order 303.1(I)(A)(1)(f-g), (III)(A)(1) & (III)(B)(5) (Pet. Br. Add. 4, 29-30). Thirty percent of all MPD roll call training must be traffic enforcement related. MPD General Order 303.1(III)(B)(8) (Pet. Br. Add. 30).

will always be free to submit evidence, if it can, that the stopping officer's practice is unrepresentative and that reasonable officers are trained to, and do in fact, routinely stop motorists under similar circumstances. If the stopping officer testifies that the stop was consistent with his standard practice and that of others, absent a contrary departmental policy, that will presumably be the end of the matter unless there is evidence that the officer's claimed practice is not representative.

Petitioners submit that the vast majority of traffic stops will easily pass the "reasonable officer would have" standard and that judges will be able to spot those few unreasonable stops in which the police have arbitrarily deviated from standard procedure. Here, for example, MPD regulations affirmatively prohibited the officers who stopped petitioners' car from taking such enforcement action.[9] Moreover, even aside from the written procedures, Officer Soto candidly acknowledged that as a vice officer on plainclothes patrol, he stops drivers for traffic infractions "[n]ot very often at all" (Pet. Br. 7

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[9] The government is plainly wrong in suggesting (Govt. Br. 38) that a reasonable officer could have thought the Pathfinder's violations were "so grave as to pose an *immediate threat* to the safety of others" so as to permit enforcement action under MPD General Order 303.1(I)(A)(2)(a)(4) (Pet. Br. Add. 4) (emphasis in original). First, the infractions did not occur "at night" (Govt. Br. 38). Officer Soto testified at the preliminary hearing that it was "still light" (6/16/93 Tr. 8). Second, as described by Officer Soto himself, these infractions were not of a type that "would somehow endanger the safety of anybody" (Pet. Br. 7 (quoting Tr. 72-73)). *See also* MPD General Order 303.1(I)(A)(1)(e) (Pet. Br. Add. 3) (department policy even with respect to officers on regular patrol is "[t]o target enforcement activities against those committing *hazardous* violations") (emphasis added).

(quoting Tr. 78)). The record establishes the objective unreasonableness of this stop.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief for the Petitioners, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed, and the case should be remanded for entry of an order vacating petitioners' convictions and suppressing all evidence obtained as a result of the unconstitutional seizure in this case.

Respectfully submitted,

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April 9, 1996

No. 95-5841

IN THE

Supreme Court Of The United States

October Term, 1995

MICHAEL A. WHREN AND JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation. NACDL is comprised of more than 8,000 lawyers from throughout the United States and several foreign countries. In addition, NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues of common concern. In conjunction with the affiliates, NACDL speaks for more than 28,000 criminal defense lawyers. NACDL was formed more than 30 years ago to advance the quality of the defense of the rights of accused persons, as well as to advocate the preservation of constitutional rights in this country.

One of NACDL's most important objectives is to establish vigorous enforcement of the individual liberties guaranteed by the Constitution and to deter law enforcement officers from violating those rights. Central to these objectives is vigorous enforcement of the Fourth Amendment. NACDL's *Amicus Curiae* Committee has concluded that the present case could have a significant impact on the right of the American people to be free from warrantless, arbitrary invasions of their right of privacy. NACDL therefore writes in support of petitioners in an effort to ensure that this Court does not, for the first time, permit capricious, bad faith seizures by law enforcement officers.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Warrantless seizures of persons have always been presumed to violate the Fourth Amendment. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that brief, on-the-street seizures would be permissible only if such stops are shown to be objectively reasonable in light of the totality of circumstances. This standard has been successfully applied to an almost limitless assortment of factual situations for nearly thirty years.

The court below erroneously concluded that the "totality of the circumstances" test need not apply in cases in which a law enforcement officer witnesses a violation of even the most trivial traffic offense. Seizures would be permissible even if, in light of the surrounding facts, no reasonable officer would have made the stop. Should this Court adopt that reasoning, police officers will be granted license to arbitrarily stop virtually anyone who ventures onto America's streets and highways. Warrantless seizures at the unfettered discretion of the officer will become the rule, not the exception. The Court must not allow the Fourth Amendment to be stripped of its vitality for the public. Each case must be objectively and reasonably judged based on the totality of the circumstances. Reversal is required.

ARGUMENT

I

OBJECTIVE CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES MUST BE THE MINIMUM STANDARD FOR ALL WARRANTLESS SEIZURES OF PERSONS

The issue presented by this case goes to the very essence of the Fourth Amendment rights of all persons on America's streets and highways. The Court is called upon to decide whether to grant all law enforcement officers unfettered authority to seize any person who commits even the most trivial regulatory violation. Granting such license would permit police officers to make wholesale warrantless seizures even when, under the totality of the circumstances, no reasonable officer would do so.[1] Application of principles that have repeatedly proven sound, coupled with the application of common sense, demonstrate that this Court must deny such authority.

A. The government must prove that warrantless seizures are objectively reasonable in light of all pertinent facts.

This Court has consistently required that government agents obtain warrants from neutral and detached magistrates before conducting searches or seizures. *See, e.g. Katz v. United States,* 389 U.S. 347 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964). In limited circumstances, however, the Court

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[1] At the outset, NACDL joins the argument in the *amicus curiae* brief filed by the American Civil Liberties Union (ACLU) that the Fourth Amendment prohibits law enforcement officers from making pretext stops or arrests for trivial offenses when the court finds that the officer's actual purpose was to interrogate or search based on the officer's hunch that a serious offense, unrelated to this stop, was being committed. Because this argument is well developed in the ACLU's brief, it is not restated here.

has recognized that the exigency of an on-the-street encounter between a police officer and a citizen may justify the warrantless seizure of the citizen. When the government has argued that such an exemption should be carved from the Fourth Amendment, the Court always has engaged in painstaking analysis to ensure that such and exemption is consistent with the interests of a free society. When such an exemption has been granted, the Court has been careful to strictly limited its scope.

B. Warrantless seizures may be upheld only if objectively reasonable under the totality of the circumstances.

The Court's analysis in cases such as this involves two components. First, the actions of a police officer always are judged on a standard of reasonableness. *See, e.g., Horton v. California*, 496 U.S. 128, 138 (1990). Second, the legality of an intrusion is objectively decided in light of all the surrounding circumstances. *See, e.g., Graham v. M.S. Connor*, 490 U.S. 386, 396 (1989). Chief Justice Rehnquist, writing for the Court in *Scott v. United States*, 436 U.S. 128, 137 (1978), pointed out, "[A]lmost without exception in evaluating alleged violations in the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *See also Florida v. Jimeno*, 500 U.S. 248, 250-251 (1987); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977); *Terry v. Ohio*, 392 U.S. at 21-22. Indeed, such analysis has served the Court so well that it has been applied in other Fourth Amendment contexts. *See, e.g., United States v. Leon*, 468 U.S. 896, 922 (1984).

C. The court below did not follow the objective "totality of the circumstances" standard that this Court requires.

Courts are frequently confronted with arrests made following alleged "pretext" stops. These are generally seizures of motorists for very minor violations under circumstances suggesting that the officer used the minor violation to investigate a serious offense for which the officer lacked cause to interfere with the motorists' Fourth Amendment rights. Most state appellate courts that have decided the issue[2], as well as the Ninth[3] and Eleventh[4] Circuits, have correctly applied the "reasonable officer/totality of the

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[2] *Townsel v. State*, 763 P.2d 1353, 1354-1355 (Alaska App. 1988); *Mings v. State*, 886 S.W.2d 596 (Ark. 1994); *Kehoe v. State*, 521 So.2d 1094 (Fla. 1988); *People v. Mendoza*, 599 N.E.2d 1375 (Ill. App. 1992); *State v. Izzo*, 623 A.2d 1277 (Me. 1993); *State v. Hoven*, 269 N.W.2d 849, 852 (Minn. 1978); *State v. Van Ackeren*, 495 N.W.2d 630, 642-645 (Neb.), *cert. denied*, 114 S.Ct. 113 (1993); *Alejandre v. State*, 902 P.2d 794, 796 (Nev. 1995); *People v. James*, 630 N.Y.S.2d 176 (N.Y. App. Div. 1995); *State v. Moracco*, 393 S.E.2d 545, 548 (N.C. App. 1990); *State v. Hawley*, 540 N.W.2d 390, 392 (N.D. 1995); *State v. Spencer*, 600 N.E.2d 335, 337 (Ohio App. 1991); *State v. Olaiz*, 786 P.2d 734, 736 (Or. App. 1989); *State v. Sanders*, ____ S.W.2d _____. 1996 W.L. 15650 (Tenn. Cr. App. 1996); *Commonwealth v. Powell*, ____ S.E.2d ____, 1995 W.L. 764082 (Va.App. 1995); *State v. Chapin*, 879 P.2d 300, 303-304 (Wash. App. 1994); *Whiteley v. State*, 418 P.2d 164, 168 (Wyo. 1966).

[3] *See, e.g., United States v. Hernandez*, 55 F.3d 443, 445 (9th Cir. 1995).

[4] *See, e.g., United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991). *See also United States v. Scopo*, 19 F.3d 777, 785-786 (2d Cir. 1994)(Newman, J., concurring); *United States v. Causey*, 834 F.2d 1179, 1187 (5th Cir. 1987)(Rubin, J., dissenting); *United States v. Ferguson*, 8 F.3d 385, 396 (6th Cir. 1993)(*en banc*)(Keith, J., dissenting); *United States v. Botero-Ospina*, 71 F.3d 783, 789, 792 (10th Cir. 1995)(*en banc*)(Seymour, C.J., dissenting).

circumstances" test.[5] Other lower courts have refused to apply this familiar standard, substituting a narrow, restricted inquiry. For example, in the present case, the lower court ruled that police officers may stop and question anyone as long as the officers "witness or suspect a violation of traffic laws, even if the offense is a minor one." *United States v. Whren*, 53 F.3d 371, 375 (D.C. Cir. 1995)(quoting *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991), *cert. denied*, 504 U.S. 924 (1992))(Joint Appendix, "J.A.", at 13). This is frequently referred to as the "could have" test. (*Id.* at 15).

Lower courts that have upheld seizures based on the "could have" test have done so due to either a misinterpretation of the "totality of the circumstances" test or a misunderstanding of this Court's application of the Fourth Amendment to provide reasonable protection of citizens' right to privacy.

1. The "totality of the circumstances" test need not include inquiry into the officer's subjective intent.[6]

Turning first to the error concerning the "totality of the circumstances" test, most of the federal circuit courts - including the court below - have come to the mistaken conclusion that an examination of all of the facts in front of the officer making a challenged traffic stop would necessarily

[5] This standard in pretext cases is commonly referred to as the "would have" test, in that the issue is whether an objectively reasonable officer "would have" made the challenged seizure in light of the surrounding circumstances. *See, e.g., United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994).

[6] Officers must not, however, be permitted to deliberately circumvent the requirements of the Fourth Amendment. *See* note 1, *supra*.

include a review of the subjective thoughts or desires of the arresting officer.[7]

The decision in the present case is typical, stating that an examination of whether a reasonable officer would have made the challenged seizure includes "the necessity for the court's inquiring into an officer's subjective state of mind . . ." (J.A. 16). This conclusion is clearly erroneous; when a seizure is based on a minor traffic violation, there is no reason to apply a standard that is any different from that applied in every other variety of brief, on-the-street seizure. Looking beyond the unduly narrow question of whether the officer witnessed an insignificant traffic violation does not require consideration of the officer's "subjective state of mind"; as the Court of Appeals for the Ninth Circuit stated, "We focus on the objective facts and ask whether a reasonable officer, given the circumstances, would have made the stop absent a desire to investigate an unrelated serious offense." (citations omitted). *United States v. Hernandez*, 55 F.3d at 445. In other words, the applicable standard is the standard that this Court announced a generation ago in *Terry v. Ohio*.

2. The *Terry* standard best serves the interests at stake.

A minority of the lower courts have rejected a totality of the circumstances approach on the grounds that it is too difficult to administer.[8] This assertion must be rejected for three reasons. First, examinations of all the facts under the

[7] *United States v. Scopo*, 19 F.3d at 785-786; *United States v. Johnson*, 63 F.3d 242, 247 (3rd Cir. 1995); *United States v. Hassan El*, 5 F.3d 726, 731 (4th Cir. 1993); *United States v. Causey*, 834 F.2d at 1182; *United States v. Hope*, 906 F.2d 254, 257-258 (7th Cir. 1990); *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1991).

[8] *United States v. Ferguson*, 8 F.3d at 392; *United States v. Botero-Ospina*, 71 F.3d at 786.

objective standard have been successfully conducted in cases involving brief, on-the-street encounters for nearly three decades since this Court decided *Terry v. Ohio*. Determining whether a reasonable officer would make a stop for a minor traffic violation is certainly no more difficult than deciding the reasonableness of a seizure made based on myriad observations in a complex, multiple suspect case in which information is exchanged between officers from different agencies having different interests. It is particularly significant that a majority of the state courts that have addressed the issue have followed the objective totality of the circumstances analysis.[9] While the federal courts are primarily responsible for interpreting and enforcing the Constitution, the state courts quite naturally have far greater experience with the enforcement of traffic laws.

Secondly, the threat of arbitrary seizures and invasions of privacy far outweighs the minimal benefit to the government in pretext stop cases. This Court has repeatedly applied a balancing test to determine whether the government's interest in interfering with the rights guaranteed by the Fourth Amendment outweighs the public's interest in those rights. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. at 654; *Pennsylvania v. Mimms*, 434 U.S. at 108-109; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. at 20-21; *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967). Such balancing clearly demonstrates that the "totality of the circumstances" test must continue to be applied to all traffic stops, including those purportedly based on insignificant violations. The government's legitimate interest in enforcing minor, frequently arcane motor vehicle laws is hardly a strong one. In situations in which a suspect's

[9] *See* note 2, *supra*.

conduct may present a danger to persons or property, a seizure is clearly reasonable and no pretext issue exists. Pretext issues only arise in cases in which an officer has less than a founded suspicion of felonious conduct, and then discovers a minimal violation, such as when a driver's wheel briefly crosses four inches over a lane marker[10], when fuzzy dice are hung from the rear view mirror[11], when the motorist turns right without signaling[12] or when a license plate is displayed in the rear window, not attached to the bumper[13]. The government's interest in making such seizures is accurately described as "marginal at best." *Delaware v. Prouse*, 440 U.S. at 660.[14]

The threat to privacy, on the other hand, is great. As the Florida Supreme Court has recognized, "It is difficult to operate a vehicle without committing some trivial violation . . ." *Kehoe v. State*, 521 So.2d at 1096. In light of the extensive daily reliance on motor vehicle travel by Americans, the standard adopted by the court below would subject the vast majority of the populace to interference from government agents who seek, without cause, to pry into private affairs or interfere with the right to be left alone.

[10] *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987). *See also Alejandre v. State*, 903 P.2d at 795.

[11] *People v. Mendoza*, 599 N.E.2d at 1377.

[12] *State v. Myers*, 798 P.2d 453 (Id. App. 1990).

[13] *State v. Chapin*, 879 P.2d at 301.

[14] Although courts see pretext issues only when seizures lead to the discovery of evidence of more serious crimes, the discovery of such evidence cannot be weighed on the government's side of the balance because the more serious crimes were not the focus of the seizure. If an officer has sufficient cause to believe that a serious offense is being committed, the seizure will be upheld on that basis and the evidence will be admissible.

Indeed, it would appear that the lower court's erroneous interpretation of the Fourth Amendment would not be limited to motor travel. An officer could seize a pedestrian who crosses a deserted street a few inches outside of a crosswalk. In essence, the approach taken by the court below allows all law enforcement agents to arbitrarily decide who will be hindered and who will be left alone. If the Fourth Amendment is to retain any vitality for citizens walking or driving on our streets and highways, reversal is required.

Finally, it has been claimed that the constricted "could have" test is easier for the courts to apply. Certainly, it would be "easier" to always - or never - require a warrant before any search or seizure is conducted. However, "[b]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Scott v. United States*, 436 U.S. at 139. *See also Graham v. M.S. Connor*, 490 U.S. at 396; *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The enforcement of constitutional rights often demands that difficult judicial decisions be made. As Justice Jackson recognized in an opinion that not coincidentally came in the direct aftermath of World War II, "The forefathers, after consulting the lessons of history, designed our constitution to place obstacles in the way of too permeating police surveillance, which they seem to think was a greater danger to a free people than the escape of some criminals from punishment." *United States v. Di Re*, 332 U.S. 581, 595 (1948).

NACDL submits that, when the validity of a seizure based on a minor violation of the law is subject to judicial inquiry under the Fourth Amendment, application of the *Terry* standard properly balances the interests of the parties. The inquiring court must examine the evidence and answer the question, "Would a reasonable officer charged with enforcing

such laws[15] have made the challenged seizure?" If the answer is "yes", the government carries its burden of establishing the lawfulness of the warrantless seizure. The long history of judicial decisions concerning *Terry*-type intrusions provides guidance to police officers, counsel and the courts. This proposal is consistent with the decisions of this Court, provides a workable solution, and properly balances the government's need to investigate crime with the public's right to be free from arbitrary invasions of privacy.

This Court must not permit the Fourth Amendment rights of motorists and pedestrians to be controlled by the unfettered discretion of government agents. If all manner of police officers are allowed to make seizures for infractions so minor that no reasonable officer would make the stop, the Fourth Amendment will be meaningless for anyone who steps onto a street or into a car. The decision of the court below must therefore be reversed.

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[15] The assigned duties of the seizing officer provides one of the objective factors that are a part of this inquiry. While it may be reasonable for a traffic officer to stop a motorist for traveling five miles per hour over the speed limit, the same may not be true if the officer's duties are limited to enforcing narcotics laws.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia must be reversed. This matter must be remanded to the district court for consideration of the legality of the traffic stop in light of the totality of the circumstances.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. WHREN, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Both principles are involved in this important Fourth Amendment case. By preserving a zone of personal privacy, the Fourth Amendment protects an important aspect of individual liberty. By limiting police discretion to invade that zone of personal privacy for inappropriate reasons, the Fourth Amendment promotes equal treatment under the law. Pretextual searches, on the other hand, trivialize the interest in personal privacy and encourage discriminatory law enforcement. The proper resolution of this case is, therefore, a matter of concern to the ACLU and its members around the country.

STATEMENT OF THE CASE

On June 10, 1993, Michael Whren and James Brown, two young black men, were driving a Nissan Pathfinder with temporary tags through the streets of Southeast Washington, D.C. Their car was stopped by plainclothes officers from a vice unit who were patrolling the area looking for illegal drug activity. The defendants were arrested after the police discovered crack cocaine in the car.

The police contend that they stopped the car for alleged traffic violations, although it is undisputed that the policy of the D.C. Police Department is that officers "who are not in uniform or are in unmarked vehicles may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

others,"[2] and that no such threat existed in this case. Defendants contend that the alleged traffic violations were a mere pretext that allowed plainclothes vice officers to stop the car for a drug search without probable cause or reasonable suspicion.

In denying defendants' motion to suppress, both the district court and the court of appeals acknowledged that the police lacked any constitutionally adequate suspicion to stop the car and search for drugs. And neither court quarreled with defendants' assertion that the alleged traffic violations were only a pretext to conduct a drug search for which there was no other colorable constitutional basis. Both courts nevertheless concluded that the issue of pretext was constitutionally irrelevant so long as there was reason to believe that defendants were actually committing a traffic violation.

The court of appeals in this case recognized that the standard for reviewing pretextual searches has divided the circuits and chose to embrace a standard under which the only relevant inquiry is whether the defendants "could have" been stopped for violating the traffic laws. Since the answer to that question in this case is obviously yes, the court ruled that there had been no Fourth Amendment violation. In reaching this determination, the D.C. Circuit specifically rejected the test adopted by two other circuits, which asks whether a reasonable police officer "would have" conducted the search under similar circumstances. In addition, the D.C. Circuit interpreted the "could have" test in the broadest possible fashion. Thus, the fact that these officers could *not* have stopped defendants' car for a mere traffic violation under existing regulations was deemed irrelevant so long as some officer on the D.C. police force could have done so.

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[2] Washington Metropolitan Police Department General Order 303.1(I)(A)(2)(a)(4), issued April 30, 1992 (emphasis in original).

SUMMARY OF ARGUMENT

This case raises a fundamental Fourth Amendment issue in a common factual setting. Whether intentionally or not, virtually everyone violates the traffic laws at one point or another. Inevitably, the police exercise broad discretion in deciding whom to stop. According to the court below, that discretion cannot be questioned even if the police act on the one basis that the Fourth Amendment most clearly forbids -- namely, the inarticulate and unsubstantiated hunch that the person stopped may be violating some other criminal law.

This result cannot be reconciled with either the underlying principles of the Fourth Amendment or this Court's previous decisions. In particular, the Court has never adopted such a cramped view of the Fourth Amendment's reasonableness requirement. As this Court has recognized, reasonableness can only be judged in context. In circumstances where there is no reason to fear the abuse of police discretion, such as drunk driving roadblocks, the police may be allowed to stop cars on the highway even in the absence of individualized suspicion. *See Michigan v. Sitz*, 496 U.S. 444 (1990). But the corollary proposition is also true. The concerns of the Fourth Amendment are not automatically satisfied merely because there is a basis to stop a person or car. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

For example, if the police singled out cars for traffic stops on the basis of race or the political views expressed on a bumper sticker, important constitutional norms would be violated. Those norms, moreover, are not limited to the Equal Protection Clause and the First Amendment. The Fourth Amendment also embodies an important equality principle. Indeed, one of the basic purposes of the Fourth Amendment is to reduce the risk of arbitrary or discriminatory police behavior, and thereby insure equal treatment under the law. *See Marshall v. Barlow's Inc.*, 436 U.S. 307

(1978); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

It is not surprising, therefore, that this Court's opinions repeatedly suggest, albeit in *dicta*, that pretextual stops violate the Fourth Amendment. That proposition, of course, is consistent with a broader body of constitutional law, which holds that government violates the Constitution when it acts for the wrong reason even though it has broad discretion to act for almost any reason at all. Thus, a public university may refuse to renew the contract of a non-tenured faculty member for a multitude of reasons without being subject to constitutional scrutiny. But it may not do so to punish the faculty member for the expression of his or her constitutionally protected views. *See Perry v. Sindermann*, 408 U.S. 593 (1972). In another analogue that is perhaps closer to the facts of this case because it first arose in a criminal context, a prosecutor may use peremptory challenges to disqualify prospective jurors for many reasons, including entirely frivolous ones. But this Court has made clear that a prosecutor may not act on the basis of a juror's race or gender. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. __, 114 S.Ct. 1419 (1994).

A search that would never have taken place if the police were not looking for an excuse to circumvent the requirements of the Fourth Amendment is a search for the wrong reasons and should be condemned. Among other things, it is too easy for the police either to invoke or invent a traffic violation after the fact to justify a search that was unlawful at its inception. The more difficult question is not whether to prohibit pretextual searches but how to determine whether a pretextual search has occurred.

On that issue, this is an easy case. The D.C. Police Department has an explicit regulation that bars plainclothes officers in unmarked cars from making traffic stops. There is

not even a pretense, therefore, that the officers in this case were engaged in routine traffic enforcement. The traffic stop was simply a means to an end, and the end was a search for illegal drugs that was plainly unjustified based on the facts that the police knew at the time.

Most cases, unfortunately, will not be so easy because there will not always be written regulations. The existence of a written regulation, however, is only one form of objective proof that the police were acting for pretextual reasons. It is not the only form. Indeed, the general rule when analyzing the reasonableness of a police stop is to ask whether the stop would have been made by a reasonable officer in similar circumstances. *Terry v. Ohio*, 392 U.S. 1 (1968). That is the test now applied by the Ninth and Eleventh Circuits and it is an appropriate test in our view, as well. At the very least, it should shift the burden to the police, as the burden shifts to the prosecutor under *Batson*, to establish a valid, non-pretextual reason for the search.

The court below rejected the "would have" test in favor of a test that merely asks whether any police officer "could have" stopped the defendants under equivalent facts. The issue of pretext, however, only arises when the defendants "could have" been stopped for other reasons. Thus, the "could have" test applied by the D.C. Circuit in this case is not really a test for pretext at all. It is, instead, a mechanism for rejecting each and every pretext claim.

Finally, there may be some cases where even the "would have" test may be insufficient to ferret out all pretextual searches. For example, a reasonable traffic officer will, in most cases, stop speeding motorists who go through red lights. Yet, a particular officer may still stop a particular motorist for constitutionally impermissible reasons. Such subjective bad faith is notoriously difficult to prove. Nothing in this Court's Fourth Amendment jurisprudence, however, requires a trial judge to ignore evidence of unconstitu-

tional motive when it comes to light. To the contrary, this Court's precedents make clear that use of the exclusionary rule makes perfect sense under these circumstances precisely because it removes the incentive for unconstitutional police behavior.

ARGUMENT

I. THE FOURTH AMENDMENT PROHIBITS OFFICERS FROM USING PRETEXTUAL REASONS TO MAKE A STOP, CONDUCT A SEARCH, OR EFFECT A SEIZURE

The Fourth Amendment prohibits "unreasonable searches and seizures." Thus, a "police officer must be able to point to specific and articulable facts" to justify an intrusion. *Terry v. Ohio*, 392 U.S. at 21. A judge must then decide whether a search or seizure was reasonable based on the circumstances. *Id.* To do less "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22; *accord Delaware v. Prouse*, 440 U.S. 648, 661 (1979)(extending *Terry* rationale to vehicle stops).

In a pretext case, the "inarticulate hunches" denounced in *Terry* and *Prouse* become the operative reason for an investigative stop. Time and again, therefore, this Court has carefully distinguished lawful searches from pretextual searches in a series of opinions spanning more than six decades. Many of those opinions deal with inventory searches. For example, in *Florida v. Wells*, 495 U.S. 1, 4 (1990), Chief Justice Rehnquist stressed that "[t]he policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence

of crime")(citations omitted). In *Colorado v. Bertine*, 479 U.S. 367, 376 (1987), Chief Justice Rehnquist again noted the absence of any evidence "that the police chose to impound Bertine's van in order to investigate suspected criminal activity." *See also South Dakota v. Opperman*, 428 U.S. 364, 376 (1976)(upholding inventory search of impounded car and noting that "there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive")(footnote omitted).

Concern about pretext also pervades this Court's other administrative search cases. In *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987), the Court upheld an administrative search of Burger's automobile junkyard only after noting that there was "no reason to believe that the instant inspection was a 'pretext' for obtaining evidence of respondent's violation of the penal laws." In *Abel v. United States*, 362 U.S. 217, 226 (1960), Justice Frankfurter used even stronger language when he wrote:

> [D]eliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.

Similar statements appear throughout this Court's Fourth Amendment jurisprudence. *Texas v. Brown*, 460 U.S. 730, 743 (1983), is illustrative. In *Brown*, the Court upheld the seizure of narcotics discovered by the police in plain view at a routine driver license checkpoint. Writing for the plurality, then-Justice Rehnquist was careful to note that there was "no suggestion that the roadblock was a pre-

text whereby evidence of narcotics violation might be uncovered." *See also Steagald v. United States*, 451 U.S. 204, 215 (1981)(ruling arrest warrant does not legitimize search of house of person not named in warrant and stressing possibility for abuse if "an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place"); *Colorado v. Bannister*, 449 U.S. 1, 4 n.4 (1980)(*per curiam*)(denying motion to suppress after discussing lack of any "evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants"); *Jones v. United States*, 357 U.S. 493, 500 (1958)(suppressing evidence that government maintained had been found in search incident to arrest and refusing to consider argument that probable cause existed for arrest because "testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search . . . not to arrest"); *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932)(providing that otherwise lawful "arrest may not be used as a pretext to search for evidence").

The cumulative wisdom of all of these cases is that pretextual searches cannot be regarded as reasonable searches under the Fourth Amendment. As this Court has repeatedly recognized, the "basic purpose" of the Fourth Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Court's longstanding condemnation of pretextual searches is neither surprising nor unusual. Indeed, it would be surprising if pretextual searches were deemed tolerable under the Fourth Amendment given the fundamental constitutional principle that the government's broad discretion to act does not include the right to act for constitutionally impermissible reasons. As this Court has broadly stated the

proposition, "even though the government may deny [a] benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. at 597. Thus, a government employee cannot be dismissed because the government disagrees with his constitutionally protected speech. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Furthermore, if a government employee is fired for two reasons, one constitutional and one not, the government must prove that it would have taken the same action even in the absence of any unconstitutional motive. *Mount Healthy v. Doyle*, 429 U.S. 274 (1977).[3] Similarly, a prosecutor's right to exercise peremptory challenges for a broad array of reasons does not include the right to exclude prospective jurors on the basis of race, *Batson v. Kentucky*, 476 U.S. 79, or gender, *J.E.B. v. Alabama*, 114 S.Ct. 1419.

Beyond these general principles, the Court's condemnation of pretextual searches also reflects values intrinsic to the Fourth Amendment. As this Court has often noted, issues of reasonableness turn upon context. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). In circumstances where there is little reason to fear the abuse of police discretion, the police may be allowed to stop cars on the highway even in the absence of individualized suspicion. *Michigan v. Sitz*, 496 U.S. 444. But even individualized suspicion may not suffice when there is reason to believe that the police are using traffic stops to circumvent the requirements of the Fourth Amendment. A contrary rule would effectively authorize what the Fourth Amendment most clearly condemns -- invasions of privacy based on unsubstantiated hunches that criminal activity may be taking place.

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[3] *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)(applying the *Mount Healthy* standard to mixed-motive cases under Title VII).

It is true, of course, that a pretextual stop has the patina of legality because it depends on the existence of a plausible claim that some law has been violated, albeit not the law that the police are seriously interested in investigating. However, that is merely the definition of a pretextual stop, not its justification. This Court long ago rejected the notion that the concerns of the Fourth Amendment are automatically satisfied simply because there is a basis to stop a person or car, *e.g.*, *Tennessee v. Garner*, 471 U.S. 1 (lawful stop does not justify excessive force in achieving stop), or to execute a search warrant, *e.g.*, *Wilson v. Arkansas*, 514 U.S. __, 115 S.Ct. 1914 (1995)(common law knock-and-announce rule is part of the Fourth Amendment's reasonableness inquiry).

Surely, there can be no serious quarrel with the proposition that the Constitution forbids the police from stopping motorists on the basis of race even if each of the motorists stopped has also committed a traffic violation. Such police behavior would undoubtedly violate the Equal Protection Clause. *See Delaware v. Prouse*, 440 U.S. at 667 (Rehnquist, J., dissenting). But it violates important Fourth Amendment principles, as well. *See United States v. Brignoni-Ponce*, 422 U.S. at 885-87.[4]

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[4] There are several very practical problems with relying exclusively on the Equal Protection Clause to remedy a pattern of racial discrimination in police stops. First, the absence of a pattern and practice of racial discrimination does not prove that an individual motorist was not stopped for discriminatory reasons. Second, individual defendants face well-documented and often insurmountable problems in trying to establish such a pattern and practice, at least in part because of the difficulty in obtaining relevant police records. Indeed, it was for precisely this reason that the Court in *Batson* ultimately abandoned the pattern-and-practice approach of *Swain v. Alabama*, 380 U.S. 202 (1965), in redressing the problem of discriminatory jury selection. Finally, even proof of a pattern and practice of racial discrimination may be insufficient to estab-

(continued...)

This Court has stressed that determinations of reasonableness under the Fourth Amendment turn on society's judgment about what is legitimate. *See Vernonia School District v. Acton*, 515 U.S. __, __, 115 S.Ct. 2386, 2390 (1995). If so, we are well past the time when our society is prepared to describe race-based decisions by government officials as a "legitimate" basis for the exercise of police authority. This is especially so "given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone." 1 LaFave, SEARCH AND SEIZURE §1.4(e)4 at 123 (3d ed. 1996).

On its face, of course, this case does not involve a claim of racial discrimination. However, this case cannot be resolved in a vacuum. A rule condoning pretextual searches is a rule that invites discriminatory enforcement. As Judge Newman has observed,

> "[t]he risk inherent in such a practice is that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by facts that are totally impermissible as a basis for law enforcement activity -- factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, jewelry, and flashy clothing."

United States v. Scopo, 19 F.3d 777, 785-786 (2d Cir.) (Newman J., concurring), *cert. denied*, __ U.S. __, 115 S. Ct. 207 (1994). *See also* Rudovsky, "The Impact of the War on Drugs on Procedural Fairness and Racial Equality,"

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[4] (...continued)
lish discrimination in a particular case. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987).

1994 U.Chi.L.Rev. 237, 250 (discussing evidence of racial disparity in traffic stops).

In short, pretextual searches effectively undermine the critical safeguards against arbitrary and discriminatory law enforcement that the Fourth Amendment was designed to erect. The serious question in this case, therefore, is not whether pretextual searches violate the Fourth Amendment -- that question has already been answered in numerous opinions by this Court -- but rather what standard should be applied in determining whether a pretextual search has occurred.

II. THE STANDARD FOR DETERMINING PRETEXT ADOPTED BY THE COURT BELOW IS INADEQUATE TO PRESERVE CORE FOURTH AMENDMENT VALUES

The court below framed the issue in this case as a dispute between those who advocate a subjective test for determining pretext and those who favor an objective standard. It then concluded that an objective standard was constitutionally required and that the only suitable objective standard is one that asks whether these defendants "could have" been stopped by any police officer under the facts of this case. Finally, it applied the "could have" test to uphold the stop of defendants' car despite the fact that the police officers who ordered the stop were barred by their department's own internal regulations from traffic enforcement.[5]

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[5] The willingness of the D.C. Circuit to ignore the police department's own regulations is revealing. *Compare Colorado v. Bertine*, 479 U.S. at 375-76 (disregard of standard procedures is relevant in assessing reasonableness under the Fourth Amendment). In articulating its rule, the court below stated that "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the

(continued...)

The approach followed by the court below is fatally flawed for several reasons. Most basically, the "could have" test applied by the D.C. Circuit is not a test for determining pretext but for excusing it. If the police lack even a facially plausible reason for conducting a search, there is no need to claim pretext. The search is unconstitutional because probable cause is lacking. The issue of pretext only arises when there is a facially plausible reason to conduct the search but there is also reason to believe that the police are using the search to circumvent important Fourth Amendment safeguards. Typically, as in this case, that means that the police are relying on a minor traffic violation to look for evidence of a more serious crime that they lack sufficient cause to investigate. If the only question is whether some police officer "could have" stopped the defendants for violating the traffic laws, every pretextual search will be sustained. In reality, therefore, the standard proposed by the court below can more fairly be described as a non-test.

A. The Stop And Search In This Case Should Have Been Invalidated Under Any Plausible Fourth Amendment Standard

On these facts, this should have been an easy case. It is undisputed that the defendants were stopped by plainclothes officers in an unmarked car who were assigned to search for illegal drug activity. It is also undisputed that these officers

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[5] (...continued)
suspected traffic violations." *United States v. Whren*, 53 F.3d 371, 375 (D.C.Cir. 1995)(emphasis in original). Because of the police regulations, however, an officer "in the same circumstances" as the officers in this case could not have stopped defendants' car. Thus, it is clear that the D.C. Circuit meant to give its rule the broadest possible interpretation and to sustain any search that at least some police officer on the force could have conducted.

were prohibited by their own regulations from enforcing the traffic laws. Whether one believes that is a wise regulation or not, the existence of the regulation removes any doubt about what was going on in this case. The police had a hunch that the defendants were engaged in illegal drug activity but no probable cause or reasonable suspicion. They followed defendants' car until they observed a minor traffic violation and then used the excuse of the traffic violation to stop the car and look for drugs.[6]

This is a classic definition of a pretextual search. It is no different than the "deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case." *Abel v. United States*, 362 U.S. at 226. As Justice Frankfurter appropriately noted, such a deliberate end run around the Constitution "must meet stern resistance by the courts." *Id.* The fact that this behavior was condoned by the D.C. Circuit is sufficient to show that the "could have" test it proposed is both functionally meaningless and doctrinally unsound.

It is also a test that this Court implicitly rejected in *Colorado v. Bannister*, 449 U.S. 1. In *Bannister*, the Court upheld a traffic stop that led to an arrest for stealing, noting the lack of any "evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." *Id.* at 4 n.4. This reservation would not have been necessary if the "could have" test applied since there, as here, it was clear that the traffic violation gave the police ample cause to stop the defendants' vehicle.

[6] By the same token, had the police conducted themselves in accordance with the regulation a court could presume, subject to rebuttal, that the search was not pretextual. *See* n.10, *infra*.

B. In The Absence Of A Controlling Regulation, The Appropriate Question Is How A Reasonable Officer Would Have Acted Under Similar Circumstances

Not every case will be as easy as this one because not every case will involve police officers who so clearly violated a departmental regulation that prohibited them from engaging in the search they now seek to justify. But the existence of a regulation of this sort is only one form of objective proof. In the absence of such a regulation, it is appropriate to ask the question that this Court asked in *Terry*: "[W]ould the facts available to the officer at the moment of the seizure 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 21-22 (citations omitted). In essence, this test asks what a reasonable officer would have done in the circumstances presented. Or, as the Ninth and Eleventh Circuits have framed the issue, a stop is valid only if "under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." *See United States v. Valdez*, 931 F.2d 1448, 1450 (9th Cir. 1991); *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986); *United States v. Cannon*, 29 F.3d 472, 475-76 (9th Cir. 1994).[7] Applied to the facts of this case, for example, the issue is whether a reasonable narcotics officers, bound by his department's own regulations, would have stopped defendants' car for a minor traffic violation were it not for the hope of obtaining evidence of drugs.[8]

[7] At the time of the decision below, the Tenth Circuit also embraced the "would have" test, *see United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988). It has sinced adopted the "could have" test instead. *United States v. Botero-Ospina*, 71 F.3d 783, 786-87 (9th Cir. 1995).

[8] *See also Murray v. United States*, 487 U.S. 533 (1988)(remanding for (continued...)

The court below offered two reasons for rejecting the "would have" test, neither of which has validity. First, the court mischaracterized the "would have" test as requiring an inquiry into the "officer's subjective state of mind." 53 F.3d at 375.[9] That characterization is manifestly incorrect. Here, as in *Terry*, the reference point is what a reasonable officer would have done under similar circumstances. Not only is that an objective inquiry, it is the sort of inquiry that courts undertake on a daily basis. The court need not look into the officer's mind; the court need only look at the circumstances confronting the officer and determine whether the response was an objectively reasonable one.

The second reason offered by the D.C. Circuit for rejecting the "would have" test was the belief that it would not "provide[] a principled limitation on abuse of power." 53 F.3d at 376. As demonstrated above, however, it is the D.C. Circuit's "could have" test that does not work unless the definition of working is a test that sustains every pretextual search. There is no more reason to question the utility of a reasonableness test in this context than in any of the other contexts where it is routinely applied, including the evaluation of qualified immunity defenses in affirmative Fourth Amendment challenges. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987).

If a defendant succeeds in demonstrating that a reasonable officer would have acted differently under the same circumstances -- a showing that will presumably be difficult to

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[8] (...continued)
further hearings to determine whether police officers, who illegally entered a warehouse without a warrant, "would have" sought a search warrant anyway and thus obtained the marijuana they discovered during the illegal search under the independent source doctrine).

[9] *See also United States v. Scopo*, 19 F.3d at 782.

make in most cases -- *Batson* provides an appropriate model of how to proceed. Specifically, the burden should shift to the police to establish a valid, non-pretextual reason for the search. If the police meet this burden, the evidence should be admissible. If they do not, it should be excluded.[10]

C. Courts Need Not And Should Not Ignore Clear Evidence That A Police Officer Acted With Subjective Bad Faith To Evade The Fourth Amendment

In some cases, the "would have" test alone will be insufficient to fulfill the purposes of the Fourth Amendment. *See* Burkoff, "Bad Faith Searches," 57 N.Y.U. L.Rev. 70, 81 (1982). Objective circumstances examined without reference to motive can often be misleading. *Id.* at 120. Any objective test will undoubtedly miss some improper actions that appear objectively reasonable. For instance, an officer's statement that "I stopped the car because the driver was black" should be admissible to show unreasonableness even if the car was speeding. If the Court rules that an inquiry

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[10] An additional benefit of this test is that it may encourage police departments to promulgate general guidelines for its officers. If an officer can show that his actions were taken pursuant to a standardized policy, then those actions are likely to be upheld unless the policy is itself unreasonable. *See United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973).

As this Court noted when commenting on the inventory search practices of the Boulder Police Department:

> Nothing . . . prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.

Colorado v. Bertine, 479 U.S. at 375.

into motive is never relevant in pretext cases, officers could admit that they stopped someone because he was black without affecting a criminal prosecution. Such a holding would ignore the anti-discrimination principle of the Fourth Amendment. *See United States v. Brignoni-Ponce,* 422 U.S. at 885-87.

The whole point of Fourth Amendment doctrine has been to send messages to officers about their conduct in order to protect constitutional values. It would be inconsistent to ignore the real reason officers act and, instead, ask only whether there might be an acceptable reason that could have justified the officers' behavior. The latter approach encourages pretextual claims; it does not encourage compliance with the requirements of the Fourth Amendment.

In suggesting that an inquiry into motive is appropriate, we do not mean to say that the mere thought that someone might have drugs is enough to invalidate actions taken to enforce traffic laws. The relevant question is whether the operative reason for the stop was invalid. It is the defendants' burden to make that showing and the burden is a heavy one. But, if that showing can be made, it would be an odd notion of law that asked the court to ignore it.

None of this Court's prior decisions compel such a perverse result. Two cases are most frequently cited for the proposition that an officer's subjective motivation is irrelevant to Fourth Amendment analysis. In fact, neither case stands for such an extreme proposition. The primary case, on which the other one relies, is *Scott v. United States*, 436 U.S. 128 (1978). The issue in *Scott* was whether federal agents violated the Fourth Amendment during a court-ordered wiretap. In addressing that question, the Court ruled that the inquiry should focus on whether the agents' actions were objectively justified. *Id.* at 137-38.

Unlike this case, however, *Scott* was not a case about

pretext. The question in *Scott* was whether the agents made reasonable efforts at minimizing the calls they intercepted. The holding of *Scott* is that the answer to that question should not depend on the agents' subjective motivation.[11] In a pretext situation, by contrast, the question is precisely whether officers had an improper purpose.[12] Whether this issue can be resolved without reference to subjective motivation is a question the Court did not answer in *Scott*.[13]

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[11] Significantly, the agents in *Scott* did not exceed minimization constraints even though they apparently intended to do so. *See* Burkoff, p.17, *supra*, at 83-84. *Scott*, therefore, "merely held that improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search." Burkoff, *id.*

[12] Indeed, *Scott* expressly left open the possibility that in some situations motive can play a role in a suppression inquiry. 436 U.S. at 139 n.13. The Court provided two "limited" examples. The first example involved the applicability of the exclusionary rule in non-criminal settings, where it becomes relevant to ask whether the exclusion of evidence will effectively deter unlawful conduct. The second example involved the use of motive as a factor in assessing the credibility of officers who testify about the facts available to them at the time of the search. *Id.* Although neither of these examples touches on pretext, nothing in *Scott* forecloses the use of subjective evidence in evaluating pretext.

[13] The question was also not addressed in *Terry*, which provided for an objective standard in ordinary reasonable suspicion cases. 392 U.S. at 21-22. As *Terry* makes clear, this standard was a response to the suggestion that subjective good faith was enough to validate a stop. *Id.* at 22. The pretext question of subjective bad faith was irrelevant in *Terry*. Nor was the question addressed in *Maryland v. Macon*, 472 U.S. 463, 471-72 (1985). There, the Court, citing *Scott* for the proposition that a determination of whether the Fourth Amendment has been violated depends on an objective assessment of the officer's actions, held that a sale does not become a seizure merely because an officer kept the money. *Id.* at 471-72. Like *Scott*, *Terry* and *Macon* did not arise in the pretext context, and are similarly limited.

The second case that has been said to preclude inquiry into motive in pretext cases is *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). *Villamonte-Marquez* cites to *Scott* in a footnote dismissing the contention that, because customs officers were following a drug tip, they could not rely on a statute authorizing random boarding for document checks.[14] To the extent *Villamonte-Marquez* relies on *Scott* in a pretext context, that reliance is misplaced. Additionally, the footnote in *Villamonte-Marquez* does not state that there was evidence that the boarding would not have occurred but for the drug hunch. Instead, the evidence apparently only showed that drugs were an issue in the minds of officers. This is not surprising given that customs officers are supposed to stop drug importation. If *Villamonte-Marquez* forecloses anything in the pretext context, it stands for the proposition that it is not enough that there might be another issue on the minds of officers. We do not disagree; as discussed above, the evidence must show that the operative reason for action was improper.

[14] The footnote states that respondents "contend in the alternative that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation." The footnote then declares that such a "line of reasoning was rejected in a similar situation in *Scott*."

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

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No. 95-5841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. WHREN, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. May courts invoke the Fourth Amendment to transform police regulations into constitutional rights?

2. Should the exclusionary rule be extended to cover allegedly pretextual searches?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the continued safe operation of two useful institutions. The stop and frisk doctrine represents a crucial balancing of private and societal interests. It preserves individual rights, while giving police the necessary flexibility to deal with our volatile streets and highways. Police regulations help society by making police forces more efficient, focused, and professional.

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1. CJLF has written consent of both parties to file this brief.

Petitioners' argument, if accepted, would undermine these two beneficial practices. Their proposed "reasonable officer" standard for allegedly pretextual stops is too vague for officers to apply in the field. Requiring police regulations to guide this standard will undermine them. The threat to these institutions posed by petitioners' proposal is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On June 10, 1993, several District of Columbia undercover vice officers were patrolling for drug activity in Southeast Washington in two unmarked cars. *United States* v. *Whren*, 53 F. 3d 371, 372 (D. C. Cir. 1995). One of the cars contained Officers Efrain Soto, Jr. and Homer Littlejohn, and Investigator Tony Howard. *Ibid.*

At the suppression motion, Officer Soto testified that as his car turned left off of 37th Place north onto Ely Place, "he noticed a dark colored Nissan Pathfinder with temporary tags at the stop sign on 37th Place." *Ibid.* Soto observed the driver, Brown, looking into the lap of Whren, his passenger. At least one car was stopped behind the Pathfinder. As Soto's vehicle slowly proceeded onto 37th Place, he noticed that the Pathfinder was stopped at the intersection for over 20 seconds, obstructing traffic. As the officers started to tail the vehicle, it " 'sped off quickly' " at an " 'unreasonable speed.' " *Ibid.*

The officers followed the Pathfinder until it stopped at the intersection of Ely and Minnesota Avenue, where it was surrounded by several cars. Officers Soto and Littlejohn approached defendants' car and told Brown to put it in park. *Id.*, at 372-373. As he was speaking, Officer Soto noticed that Whren was holding a large, clear plastic bag containing what appeared to be cocaine base in each hand. *Id.*, at 373. Soto then managed to seize one of the bags from Whren, in spite of an attempt to hide the bags. Many more officers then arrived on the scene, arresting both defendants and searching the Pathfinder. The search of the vehicle recovered marijuana laced with PCP and crack cocaine. *Ibid.*

In response to questioning from defense counsel, Officer Soto denied making the stop because defendants fit a racial profile. *Ibid.* Soto testified that he had not intended to give a ticket to the driver, but instead stopped the Pathfinder "to inquire why it was obstructing traffic and why it sped off without signalling in a school area." *Ibid.* The District Court denied defendants' suppression motion, and defendants were each convicted on four counts of federal drug charges. *Ibid.* The Court of Appeals for the D. C. Circuit upheld the stop and subsequent search. *Id.*, at 376.

SUMMARY OF ARGUMENT

Reasonableness is only the starting point in any Fourth Amendment inquiry. Because of the Fourth Amendment's great scope, and the high price its enforcement exacts through the exclusionary rule, this Court must be very careful when it determines what is reasonable.

An important component of reasonableness is the principle of objectivity. This principle dictates that the propriety of a search or seizure does not turn on an officer's motive. This objectivity aids reviewing courts in giving the necessary neutral scrutiny of the officer's actions under the particular facts of the case.

Petitioners' proposed standard for allegedly pretextual searches is an unreasonably costly attempt for objectivity. Asking what a reasonable officer would do places great pressure on officers conducting stops. An unadorned reasonable officer standard does not provide enough guidance for the officer in the field. This problem is particularly acute because of the contradiction created by petitioners' proposed standard: telling an officer that a legally authorized stop is nonetheless illegal is inherently confusing.

Petitioners' use of police rules to determine what a reasonable officer would do is unacceptable. Police departments do not promulgate rules in order to protect the rights of citizens. Efficiency and officer safety are much more likely motivations for police rules. The fact that protecting individual rights is only

incidental to their purpose makes police rules unsuited for this role that petitioners would force upon them.

Elevating police rules to constitutional rights both distorts and discourages those rules. Petitioners would give the rules greater sanction than their creators intended. This distortion can only discourage police agencies from making rules out of fear of having these rules used against their departments in court. This Court recognized this concern in *United States* v. *Ceccolini*, 435 U. S. 268 (1978), where Internal Revenue Service rules were not given the sanction of the exclusionary rule due to this Court's fear that such an action would discourage agencies from promulgating rules.

The perversity of elevating administrative acts that benefit individuals into constitutional rights is also shown by prisoner rights cases. Starting with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court would elevate state-created benefits for prisoners into constitutional rights if administrators had less discretion in administering the benefits. This had the unintended effect of discouraging useful prison regulations. This Court abandoned this mode of analysis in *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) to avoid this unintended consequence.

Petitioners' reliance on police rules would also create a more subtle disincentive to burden these rules. The border between constitutional and unconstitutional under *Terry* v. *Ohio*, 392 U. S. 1 (1968) is necessarily murky. In order to minimize the risk of liability from violating the Fourth Amendment, prudent police departments may use regulations to draw a line of permissible conduct that clearly falls short of *Terry*'s border. Raising police rules to constitutional mandates makes this practice impossible. Petitioners' proposed standard would create a ratcheting effect. The rules would be turned into constitutional rights, placing them at the murky constitutional border. Any effort to avoid the risk of allowing officers to operate on the constitutional edge will be unsuccessful since attempts to create new, stricter regulations will lead to courts adopting the new regulations as the constitutional standard.

Another problem with using police rules as constitutional standards is the risk of judicial micromanagement of police

departments. Since petitioners' proposal is likely to lead to far fewer police regulations, courts applying this standard will face a regulatory void. The likely response to this situation will be judicial involvement in police rulemaking. Considerations of federalism, separation of powers, and the history of the prisoner rights cases all counsel against this development.

The exclusionary rule should not be invoked against allegedly pretextual stops. The pretext doctrine is primarily targeted against discriminatory stops. While the rare discriminatory stop deserves every condemnation, these stops will not be deterred by the application of the exclusionary rule because such stops are mainly meant to harass instead of obtaining evidence. As this Court will not apply the exclusionary rule when its deterrent purpose is not well served, the exclusionary rule should not apply to allegedly pretextual stops.

ARGUMENT

I. Petitioners' standard would unreasonably distort police regulations.

Reasonableness is the hallmark of the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . ." *Delaware* v. *Prouse*, 440 U. S. 648, 653-654 (1979) (footnote omitted).

Reasonableness is only the first part of the inquiry. The Fourth Amendment's reach is immense, covering such disparate and important topics as electronic surveillance, see *Katz* v. *United States*, 389 U. S. 347 (1967); searches of automobiles, see *Carroll* v. *United States*, 267 U. S. 132 (1925); stops and frisks, see *Terry* v. *Ohio*, 392 U. S. 1 (1968); administrative searches, *Camara* v. *Municipal Court*, 387 U. S. 523 (1967); school regulations, see *Vernonia School District 47J* v. *Acton*, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995); government employment conditions, see *National Treasury Employees Union* v. *Von Raab*, 489 U. S. 656 (1989); and sobriety checkpoints, see *Michigan Dep't of State Police* v. *Sitz*, 496 U. S. 444 (1990). Much of this law is formulated and enforced under the very costly exclusionary rule. See, *e.g.*, *United States* v. *Leon*, 468

U. S. 897, 907 (1984). Given the pervasiveness of the Fourth Amendment and the high cost its enforcement exacts, this Court must be very careful when determining what is reasonable.

A principle that helps this Court administer the Fourth Amendment with appropriate care is the need for objectivity.

This Court's Fourth Amendment jurisprudence prizes objectivity. The propriety of a search or seizure does not turn on the officer's motives. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott* v. *United States*, 436 U. S. 128, 137 (1978). Objectivity is essential because

> "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry*, *supra*, 392 U. S., at 21.

This inquiry makes finding an objective standard an imperative. See *id.*, at 21-22; see also *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964); *Henry* v. *United States*, 361 U. S. 98, 102-103 (1959).

Petitioners' proposed standard of "what a reasonable officer *would* do," see Pet. for Cert. 8-14; *United States* v. *Cannon*, 29 F. 3d 472, 475-476 (CA9 1994); *United States* v. *Guzman*, 864 F. 2d 1512, 1517 (CA10 1988); *United States* v. *Smith*, 799 F. 2d 704, 709 (CA11 1986), sacrifices the Fourth Amendment principles discussed above. It is an unreasonable standard cloaked in the language of the reasonable. The "would" standard's costs to society considerably outweigh any incidental benefit it accords individuals. This standard is dependent upon using police regulations to exclude evidence at criminal trials. This gives police regulations an impact much greater than intended. These important regulations will be changed or abandoned to avoid the disproportionately costly sanction of the exclusionary rule.

The objectivity purported by petitioners' standard is better achieved at a lower cost by the "could have" standard invoked

by the court below. See *United States* v. *Whren*, 53 F. 3d 371, 375 (D. C. Cir. 1995). This standard provides the courts with the necessary objectivity to review allegedly pretextual stops, while minimizing the costs of such review to the police and the society they serve.

A. Defining "Would."

The first problem with petitioners' proposal is determining what a reasonable officer *would* do. Under the could standard devised by the court below, a court simply looks to the officer's formal constitutional authority to conduct a stop. *United States* v. *Whren*, 53 F. 3d 371, 376 (D. C. Cir. 1995). An officer is authorized to stop automobiles when there is reasonable suspicion that the vehicle is being used to facilitate some crime, see *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975), or when the driver of the vehicle commits a traffic violation. See *Delaware* v. *Prouse*, 440 U. S. 648, 659 (1979). These limits are objective and well known to officers since they deal with the requirements of *Terry* v. *Ohio*, 392 U. S. 1 (1968) on a daily basis and are intimately familiar with the traffic laws.

Petitioners' narrower "would" standard attempts to further control officers' conduct in order to prevent allegedly pretextual searches. Because it attempts to predict conduct, what a reasonable officer "would" do, it is less certain than the "could" standard, which simply describes what can be done.

Petitioners' standard is also more intrusive. By narrowing the permissible course of conduct, the "would" standard is better described as a "should" standard, telling officers what they should do in a given situation. The nature of traffic stops makes this potentially dangerous advice to be giving to police. *Terry* stops involve "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ." *Terry*, 392 U. S., at 20. This precludes an officer from making any detailed, nuanced analysis before deciding to stop a vehicle. Therefore, courts must weigh evidence supporting a vehicular stop "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States* v. *Cortez*, 449 U. S. 411, 418 (1981).

Any attempt to predict what a reasonable officer would do must also be readily understood and applied by the officer in the field.

> "But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U. S. 200, 213-214 (1979).

These principles require more than simple reliance on a reasonable officer standard. While this Court does not attempt to reduce *Terry*'s reasonable suspicion standard " 'to a neat set of legal rules,' " *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983)), reasonable suspicion does have a unifying theme—"a suspicion that the particular individual being stopped is engaged in wrongdoing." *Cortez*, *supra*, 449 U. S., at 418. Petitioners' "would" standard runs counter to this principle. By focusing on what an officer *would* do instead of what *could* be done, petitioners' standard would exclude stops supported by reasonable suspicion. In order to minimize the confusion caused by this contradiction of *Terry*'s basic principle, cf. Butterfoss, Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine, 79 Ky. L. J. 1, 49 (1990-91) (officers won't understand why authorized but pretextual stop is wrong), some structure must be given to the "would" standard.

Petitioners' reliance on police rules and regulations to govern the "would" standard is an improvisation forged from necessity. *Terry* cannot be reduced to a set of concrete propositions, and this Court refuses to allow the courts to supervise the daily conduct of the police. See *Rizzo* v. *Goode*, 423 U. S. 362, 380-381 (1976). Therefore, the task of structuring petitioners' standard defaults to police regulations.

This fact is fatal to the "would" standard. Police regulations were never designed to justify excluding evidence in a criminal trial. Because they were not meant for the role intended by petitioners, police regulations cannot achieve the purpose sought by the "would" standard.

B. The Problems with Regulations.

1. Unintended consequences.

If accepted, petitioners' attempt to invoke police regulations to exclude evidence would provide a textbook example of the law of unintended consequences. Because police regulations are not meant to serve as evidentiary rules, using them for this purpose will have effects other than simply deterring police misconduct. These unintended effects override any potential benefit from backing police regulations with the force of the exclusionary rule.

Regulations promulgated by police departments are a relatively recent innovation. Historically, investigative practices were informal and rarely reduced to writing. This changed in the 1970s as departments began to promulgate their own rules. See LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 446 (1990).

These written directives "assist in setting goals, and they define policy, establish procedures, and set forth the rules and regulations of the organization. They are intended to guide the efforts and objectives of the department so that all activity is characterized by a singleness of purpose." O. Wilson & R. McLaren, Police Administration 136 (4th ed. 1977). Because they give a "singleness of purpose" to "all activity," police rules and regulations will govern a host of practices. Labor regulations; community regulations; efficient use of resources; compliance with health, safety, and environmental regulations; the relative importance of various crimes; crime-fighting tactics; and protecting citizens' rights are some of the areas that can be covered by police regulations.

Most police regulations are thus unlikely to be intended to protect private rights. The present case provides an excellent

example. Preventing undercover, plainclothes, and off-duty police from making traffic stops, see Pet. for Cert. 5, n. 3, does not protect the privacy of citizens.

What matters most to the citizen is the fact of being stopped, not whether the officer was in uniform or on duty. Efficiency is the most likely goal served by this regulation. It is inefficient for plainclothes or undercover officers, who are presumably investigating relatively serious crimes, to go after traffic offenders, except when there is an immediate threat to the public safety.

This regulation also has a safety component. Limiting traffic stops to uniformed personnel in marked vehicles prevents the person being stopped or third parties from believing that the unidentified officer is committing a crime against the stopped person, thus promoting officer safety. While the Fourth Amendment can regulate violence against private citizens perpetrated by police or their agents, *Tennessee* v. *Garner*, 471 U. S. 1, 7 (1985); cf. *Brower* v. *County of Inyo*, 489 U. S. 593, 597 (1989) (seizure occurs "only when there is a governmental termination of movement *through means intentionally applied*" (emphasis in original)), preventing overreaction on the part of third parties is not part of the privacy protected by the Fourth Amendment.

While the driver's anxiety is a legitimate Fourth Amendment interest, see *Delaware* v. *Prouse*, 440 U. S. 648, 657 (1979) (anxiety is part of the cost of being stopped), this does not imply that the D. C. police promulgated this regulation in order to protect Fourth Amendment interests. There is no constitutional right to be free of stops from undercover officers. Stops by uniformed officers have their own special infringements, such as the "possibly unsettling show of authority" that comes from a stop by a marked vehicle. See *ibid*. Undercover officers have the same authority to make stops as their uniformed compatriots. Thus *Terry* upheld a stop by a plainclothes officer. See *Terry* v. *Ohio*, 392 U. S. 1, 5 (1968). There is simply no substantial constitutional interest protected by the D. C. police regulation.

The fact that most police regulations are not meant to preserve privacy rights makes them particularly ill-suited to preserving citizens' privacy. Police regulations are closely

analogous to statutes. Both are formal rules enacted by some body; *regulations* coming from the executive, while *statutes* are derived from the legislature. See Black's Law Dictionary 1286, 1410 (6th ed. 1990). By allowing a criminal defendant to use the exclusionary rule to enforce a police regulation, petitioners' proposal effectively derives a private right of action from police regulations. See Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 796 (1994) (calling defendant invoking the exclusionary rule "a kind of private attorney general").

The law of torts permits a court to elevate statute to a private cause of action only when the "legislative provision protects a class of person by proscribing or requiring certain conducts" and "that remedy is appropriate in furtherance of the legislation and needed to assure the effectiveness of the provision . . . ." Restatement (Second) Torts § 874A. Most police regulations will fail this test. They were not designed to protect citizens' privacy.

Nor is the application of the exclusionary rule appropriate "in furtherance of the legislation . . . ." Police rules are designed to be enforced by disciplinary actions against the offending officer. See Wilson & McLaren, *supra*, at 138. There is no reason to believe that police rules are intended to penalize the rest of society simply because the department determines that one of its constables has blundered. See *People* v. *Defore*, 150 N. E. 585, 587 (N. Y. 1926).

Invoking the very costly exclusionary rule, see, *e.g.*, *Nix* v. *Williams*, 467 U. S. 431, 443 (1984); *United States* v. *Leon*, 468 U. S. 897, 907 (1984), to punish the violation of police rules is unfair to the agencies that make the rules. It warps police rules by giving them punishments far out of proportion to what the rulemaker intended.

This would have dire consequences for police rulemaking. Proportionality is central to any rational system of rulemaking. It damages society when the punishment exceeds the cost of the wrongdoing. Cf. Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 56-57 (noting the inefficiency of invoking the exclusionary rule for trivial infractions of the Fourth Amendment). Imposing disproportionately costly sanctions for police rules inevitably deters police rulemaking.

This conclusion is the driving force behind *United States* v. *Caceres*, 440 U. S. 741 (1979). *Caceres* dealt with the recording of a conversation by Internal Revenue Service agents. The recording conformed with Fourth Amendment standards, but violated IRS regulations. See *id.*, at 743-744. The relevant regulations required agents to get proper prior authorization from superiors before engaging in " 'consensual electronic surveillance' between taxpayers and IRS agents . . . ." *Id.*, at 744. Knowingly violating this regulation could lead to disciplinary action against the offending agent. See *id.*, at 756, n. 25.

This Court refused to supplement these regulations with the force of the exclusionary rule because it did not wish to punish the good intentions of the IRS.

> "Regulations governing the conduct of criminal investigations are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence in criminal trials. Although we do not suggest that a suppression order in this case would cause the IRS to abandon or modify its electronic surveillance regulations, *we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.*" *Id.*, at 755-756 (emphasis added; footnotes omitted).

The *Caceres* Court understood the inevitable and costly result of distorting the sanctions the agency determines are sufficient to enforce its rules.

> "Here, the Executive itself has provided for internal sanctions in cases of knowing violations of the electronic-surveillance regulations. To go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations. But since the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations. In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form." *Id.*, at 756 (footnote omitted).

The perverse effect of converting police regulations into constitutional rights can frustrate even the best-intentioned departments. Although courts may try to paint the clearest possible picture of what the Fourth Amendment requires, the reality that the police face everyday is much murkier. "Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise." *United States* v. *Cortez*, 449 U. S. 411, 417 (1981).

A prudent police department may decide to draw a line that falls short of the necessarily murky border between what is and is not permitted under *Terry*. By using its regulations to limit officers to clearly permissible stops, the prudent department would insulate itself from the exclusionary rule, and civil liability under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971) or 42 U. S. C. § 1983.

Adopting petitioner's standard would convert these safe harbors into the new constitutional standard. Since no standard can completely explain what is and is not permitted under *Terry*, the department will be confronted with a dilemma: it may either accept this newfound but unwanted ambiguity, or it may attempt to craft a new safe harbor that falls short of the new border.

Neither result is acceptable. Simply living with the new standard will force cautious departments to cope with unnecessarily high levels of Fourth Amendment violations, as officers now conduct themselves much closer to the constitutional line. Drawing another regulatory line is no better, since the new regulations will become the constitutional standard. Thus, any attempts to create a safe zone will be frustrated as the border between constitutional and unconstitutional continuously shifts towards police regulations. This ratcheting effect will not endear police departments to self-regulation.

> "In the several cities in which police have begun to spell out their policies, the procedure has been a matter of concern to city attorneys, whose job it is to defend the city in lawsuits. If a police agency makes itself increasingly subject to suit whenever it specifies its operating policies, city attorneys are likely to instruct the police to refrain from further policy-making." H. Goldstein, Policing a Free Society 123 (1977).

The reality of the dangers described in *Caceres* is found in prisoner rights cases. Beginning with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court examined prison regulations to determine whether the regulations created constitutionally protected liberty interests that the courts would protect from prison administrators. See *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 425-428, 115 S. Ct. 2293, 2297-2299 (1995). These cases developed into an examination of how much discretion state officials had to withdraw state-created benefits from prisoners: the more discretion, the less likely that the prisoner had a constitutional interest in the benefit. See *id.*, at 426-427, 115 S. Ct., at 2298. Thus in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 11-12 (1979), state standards for granting parole were subjective and vague, calling for a prediction of future behavior, rather than an examination of the prisoner's past. While the Court accepted without explanation "respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection," *id.*, at 12, the procedures used were deemed adequate. *Id.*, at 16.

Conversely, in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), the Board had " 'unfettered discretion' " to commute sentences, with "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied to the Board." *Id.*, at 466.

This Court began to recognize the consequences of such perverse incentives in *Hewitt* v. *Helms*, 459 U. S. 460 (1983). "It would be ironic to hold that when a State embarks on such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* parsed the language of the

relevant statute, and based on the choice of words found "that the State has created a protected liberty interest." *Id.*, at 472. After *Hewitt*, close examination of prison regulations for the extent of discretion given to prison officials became the norm. See *Conner*, *supra*, 132 L. Ed. 2d, at 428, 115 S. Ct., at 2299 (discussing *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) and *Kentucky Department of Corrections* v. *Thompson*, 490 U. S. 454 (1989)).

The irrationality of these cases was finally checked in *Conner*. "The approach embraced by *Hewitt* discourages this desirable development: states may avoid the creation of liberty interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Conner*, 132 L. Ed. 2d, at 429, 115 S. Ct., at 2299-2300. The perversity of such incentives helped justify *Conner*'s decision to abandon the methodology embodied in *Hewitt*. See *id.*, at 429, n. 5, 115 S. Ct., at 2300, n. 5.

Petitioners ask this Court to make the same mistake it avoided in *Caceres* and corrected in *Conner*. Agencies must not be punished for creating rules that may incidentally benefit individuals by transforming these rules into constitutional rights. Police rulemaking confers many benefits to society. See LaFave, Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 867-868 (1990); *Caceres*, *supra*, 440 U. S., at 755. Elevating these rules to constitutional rights can only reduce police incentives for rulemaking by punishing those with the most extensive rules.

2. Micromanagement.

A second problem with petitioners' demand to elevate police rules to constitutional rights is that it creates a high risk of judicial micromanagement of police rulemaking. Because petitioners' rule deals with *Terry* stops, it necessarily involves a multitude of factual situations that cannot be neatly covered by a handful of rules. See *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989). Yet many police forces may be unwilling to create the detailed set of rules necessary to encompass the universe of *Terry* stops. Excessive rules can eliminate individual initiative and reduce morale, making the personnel "look upon themselves as simply 'bodies' rather than as partners in the enterprise. Instead

of accepting responsibility and contributing worthwhile ideas, such employees simply perform as directed without particular regard to the success or failure of the organizational objectives." O. Wilson & R. McLaren, Police Administration 138 (4th ed. 1977).[2]

Even if departments wanted to involve themselves in the messy details of regulating *Terry* stops, the perverse incentives of elevating regulations to constitutional rights will deter many police agencies from keeping these areas regulated. See Part I B 1, *ante*; *United States* v. *Caceres*, 440 U. S. 741, 755-756 (1979). Therefore, if petitioners' argument is accepted, courts confronted with an allegedly pretextual stop risk finding a regulatory void as departments either refuse to regulate or cut back on regulations in fear of the exclusionary rule or civil liability.

Courts confronted with a lack of relevant regulations are left with two choices. First, they could simply uphold the stops so long as the stop was legally authorized. This is the "could" standard that petitioners wish to overturn. The only alternative is for the courts to fill the void and determine what a reasonable officer would do in a given situation.

This would be an unusually intrusive invasion of local prerogatives. Government is generally given "the widest latitude in the 'dispatch of its own internal affairs.' " *Sampson* v. *Murray*, 415 U. S. 61, 83 (1974) (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896 (1961)). Policing is a quintessentially executive function that is left primarily to the states and localities. It is thus particularly inappropriate for a court to invoke the federal Constitution in order to create a detailed code of police procedure. See *Rizzo* v. *Goode*, 423 U. S. 362, 380-381 (1976).

Such federally mandated rules would also be improperly homogenous. Different departments have different regulatory

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2. Any attempt to thoroughly regulate the patrol officer's duties runs a real risk of being too complicated. Thus one proposed set of model rules of police conduct runs, with commentary, to 289 pages. See K. Davis, Police Discretion 102 (1975). This can be a heavy burden to place on the already overburdened patrol officers.

needs. What is proper for police in New York City may not be right for Arlington, Bangor, Omaha, or Sacramento, or the Federal Bureau of Investigation or the Immigration and Naturalization Service. A single, federal rule is the antithesis of the local experimentation that is one of the most important components of federalism. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). Indeed, much of the force behind current police rulemaking came from local experimentation. See H. Goldstein, Policing a Free Society 117 (1976).

The prisoner rights cases, discussed *ante*, at 14-15, demonstrate that elevating regulations to constitutional rights leads to judicial micromanagement of executive functions. In addition to raising disincentives to prison regulation, the methodology of *Hewitt* v. *Helms*, 459 U. S. 460 (1983) was also too costly because it "has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefits to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 429, 115 S. Ct. 2293-2299 (1995). *Terry* and its successors are no less deferential to the special needs of police. See *ante*, at 7.

Judicial micromanagement of police rules and *Terry* stops are no less intolerable than such micromanagement of our prisons. Although prison administration is a very formidable task, see *Hewitt*, 459 U. S., at 467, prisons at least offer the advantage of having controlled environments. Our streets and highways neither can nor should be subject to such control. They are also quite volatile. An officer who observes a violation that justifies a *Terry* stop should not have to worry about being second-guessed by the judiciary. In the real world of *Terry* there is not enough time.

II. The exclusionary rule should not apply to allegedly pretextual stops.

While petitioners' attack on their stop takes an objective tone, the reality of the attack is subjective. It is not the fact of the stop that their "reasonable officer" standard attacks, it is the officers' alleged motive for making the stop.

Delaware v. *Prouse*, 440 U. S. 648 (1979) noted the utility of vehicle stops in finding other incriminating information. "The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions licenses and registration papers are subject to inspection and drivers without them will be ascertained." *Id.*, at 659.

An officer's motive to gain evidence will not transform an otherwise valid act into a Fourth Amendment violation. In *Maryland* v. *Macon*, 472 U. S. 463 (1985), an undercover officer purchased two obscene magazines from an adult bookstore with marked money to facilitate an arrest and prosecution for selling obscene materials. See *id.*, at 465-466. The fact that the officer intended to recover the marked money did not transform the purchase into a warrantless seizure.

> "Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id.*, at 471.

As the stop may be invoked to try to gain incriminating information, an improper pretext must be based on darker motives.

The attack on allegedly pretextual stops is made because of the suspicion

> "that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, heavy jewelry, and flashy clothing." *United States* v. *Scopo*, 19 F. 3d 777, 786 (CA2 1994) (Newman, C. J., concurring). See also 1 W. LaFave, Search and Seizure § 1.4(e), 122 (3d ed. 1996); *United States* v. *Guzman*, 864 F. 2d 1512, 1516 (CA10 1988); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416 (1974); Pet. for Cert. 11.

Amicus neither denies the fact that a very small minority of stops might be made for these improper reasons, nor defends such discriminatory stops. Discrimination should be combated when it is found. The problem is that the exclusionary rule is the wrong tool to deal with this phenomenon.

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). It neither can nor is intended "to 'cure the invasion of the defendant's rights which he has already suffered.' " *United States* v. *Leon*, 468 U. S. 897, 906 (1984) (quoting *Stone* v. *Powell*, 428 U. S. 465, 540 (1976) (White, J., dissenting)).

Because it is no more than an extraconstitutional remedy, this Court takes a very pragmatic approach to applying the exclusionary rule. It weighs "the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence . . . ." *Leon*, 468 U. S., at 907. In practice this means weighing the deterrent effect of applying the rule against the high social cost of excluding relevant, credible evidence. See, *e.g.*, *Calandra*, 414 U. S., at 351; *Powell*, 428 U. S., at 488. Because of its uniformly high cost and remedial nature, "the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Arizona* v. *Evans*, 131 L. Ed. 2d 34, 44, 115 S. Ct. 1185, 1191 (1995). If "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted." *United States* v. *Janis*, 428 U. S. 433, 454 (1976).

Some misconduct, no matter how improper, cannot be deterred by the exclusion of evidence.

> "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." *Terry* v. *Ohio*, 392 U. S. 1, 14 (1968) (footnote omitted).

The truly improper pretextual stop is this type of activity that is immune to the threat of the exclusionary rule. "The rule simply does not reach police brutality and harassment . . . ." J. Miles, Decline of the Fourth Amendment: Time to Overrule *Mapp* v. *Ohio*, 27 Cath. U. L. Rev. 9, 78 (1977). As shown above, the movement against pretextual searches is aimed against largely discriminatory stops. Those rare officers who stop individuals in order to engage in this form of harassment simply will not be deterred by threat of excluding evidence. It is the harassment, not the search for evidence, that motivates these rogue officers.

Application of the exclusionary rule is one of the instances where the officer's motive is relevant to Fourth Amendment analysis. See *Scott* v. *United States*, 436 U. S. 128, 139, n. 13 (1978). Although this typically focuses on an officer's impeccably law-abiding motive, see *ibid.*, the Court will withdraw the sanction of exclusion when it will not deter dubiously motivated searches.

Thus in *Illinois* v. *Krull*, 480 U. S. 340 (1987), the possibility of legislative abuse did not prevent the Court from withdrawing the exclusionary rule from searches made in good-faith reliance on a statute that is later found to violate the Fourth Amendment.

> "It is possible, perhaps, that there are some legislators who, for political purposes, are possessed with a zeal to enact a particular unconstitutionally restrictive statute, and who will not be deterred by the fact that a court might later declare the law unconstitutional. But we doubt whether a legislator possessed with such fervor, and with such disregard for his oath to support the Constitution, would be significantly deterred by the possibility that the exclusionary rule would preclude the introduction of evidence in a certain number of prosecutions." *Id.*, at 352, n. 8.

The logic of the exclusionary rule cases is rigorous—if it does not deter, then the rule is not applied. "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Evans*, *supra*, 131 L. Ed. 2d, at 44, 115 S. Ct., at 1191. See also *Leon*, *supra*, 468 U. S., at 906; *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Since harassing officers will not be deterred by the exclusion of evidence, the rule should not apply. See *United States* v. *Janis*, 428 U. S. 433, 454 (1976) (do not apply the exclusionary rule if it would not lead to "appreciable deterrence"). There is no reason to compound the wrong of harassment with the wrong of exclusion that serves no purpose.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

March, 1996

Respectfully submitted,

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No. 5841

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN and JAMES L. BROWN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE STATE OF CALIFORNIA, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995
No. 5841

MICHAEL A. WHREN and JAMES L. BROWN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

INTEREST OF AMICI CURIAE

Amici curiae are states that have a direct and substantial interest in ensuring that police officers as a matter of law have the discretion necessary to determine when to initiate a traffic stop in the performance of their duties. All of the states joined herein have statutes that govern when the police may initiate a traffic stop for vehicle code violations. Amici curiae support the government's contention that the federal Constitution does not compel exclusion of evidence lawfully seized during a traffic stop merely because the officer may have had a subjective belief the occupants of the car might also be involved in illegal activity for which no reasonable suspicion to stop existed.

SUMMARY OF ARGUMENT

The Constitution does not require exclusion of evidence lawfully seized during a lawful traffic stop. In a long line of cases beginning with *Scott v. United States*, 436 U.S. 128 (1978), the Court has consistently applied a purely objective test to Fourth Amendment search and seizure questions, and rejected inquiry into the officer's subjective intent. The proper focus of the inquiry is on whether the officer had a reasonable suspicion sufficient to justify the stop, not on the officer's subjective intent at the time the challenged action was taken.

Application of the reasonable officer test advocated by Petitioners has proved to be inconsistent and highly troublesome. A reviewing court is forced to determine the difficult question whether the stop conformed to "usual police practices." In granting en banc review on its own motion, the court in *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995), overruled the reasonable officer test based on usual police practices set forth in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), as being "unworkable" for that very reason.

The Court has fashioned a body of Fourth Amendment law that clearly circumscribes the permissible scope of an investigative detention. The rights of the traveling public therefore are not abandoned to the arbitrary exercise of discretionary police power, as advocates of the reasonable officer test contend. In light of these well-established limitations, the doctrine of the pretextual traffic stop properly may be viewed as a vestigial organ in the body of Fourth Amendment jurisprudence.

ARGUMENT

ADOPTION OF A PURELY OBJECTIVE TEST TO DETERMINE WHETHER A TRAFFIC STOP VIOLATES THE FOURTH AMENDMENT GUARANTEES AGAINST UNREASONABLE SEARCH AND SEIZURE IS CONSISTENT WITH THIS COURT'S PRIOR HOLDINGS

Petitioners ask the Court to adopt a reasonable officer test to determine the constitutionality of traffic stops. Such a test requires a reviewing court to examine the officer's subjective motivation for stopping the vehicle, even where a violation of the vehicle code has clearly occurred.[1] The test is unworkable, and

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1. The federal courts of appeals have generally taken two approaches when making a purportedly objective assessment of an officer's actions in making a traffic stop. One approach is called the purely objective, "could have," or legal authorization test. It asks only whether the officer could have stopped the vehicle for a suspected traffic violation. The other approach is called the modified objective, "would have," or reasonable officer test. It asks whether a reasonable officer would have made the stop in the absence of illegitimate motivation, and considers such factors as "the kind of duty the arresting officer was on at the time he made the stop; the words and actions of the officer both before and after he made the stop [citations omitted]; and the general police practice or routine for enforcing the violation for which the stop was made." *United*

contravenes a long line of established authority which focuses on an objective assessment of the officer's actions.

Amici curiae believe the constitutionality of a traffic stop should be determined by a purely objective test--one which asks whether the officer had a reasonable suspicion that the motorist violated a provision of the vehicle code, and which disregards the subjective motives of the officer or any existing police practices with regard to such stops. *United States v. Whren*, 53 F.3d 371, 374-375 (D.C.Cir. 1995).

A. The Court Has Consistently Applied A Purely Objective Test To Fourth Amendment Issues

The seminal case establishing an objective standard by which to measure the conduct of police officers in cases alleging a violation of the Fourth Amendment is *Scott v. United States*, 436 U.S. 128 (1978) (hereinafter "*Scott*"). In *Scott*, the defendant appealed from the denial of a motion to suppress evidence obtained as a result of a wiretap. In affirming the denial below, the Court observed, "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137, 139 n.13 ("the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule . . . . This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated").

States v. Ferguson, 8 F.3d 385, 387 (6th Cir. 1993) (en banc).

The Court reasoned, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action."[2] *Id.* at 138, citing *Terry v. Ohio*, 392 U.S.

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2. The Court's adoption of the objective standard was preceded by Justice White's similar analysis in his dissent in *Massachusetts v. Painten*, 389 U.S. 560 (1967), where the issue was "whether the fact that the officers were not truthful in telling respondent their intentions required that the evidence found by the policemen after they entered the apartment be barred from admission at respondent's trial as a 'fruit' of unlawful police conduct. . . . We might wish that policemen would not act with impure plots in mind, but *I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions--if not thoughts--entirely in accord with the Fourth Amendment* and all other constitutional requirements. *In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources. . . .*" *Id.* at 565; italics added.

Justice White reiterated his analysis in a concurring and dissenting opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where he illustrated his reasoning with the following hypothetical: a warrant authorized a search for a particular incriminating item, the police "anticipated" discovery of a second item not mentioned in the warrant, and they inadvertently found a third item. *Id.* at 139. Justice White concluded, "in terms of the 'minor' peril to Fourth Amendment values" there was no difference between the incriminating items,

1, 21 (1968) (the reasonableness of a particular search or seizure must be "judged against an objective standard"); *see Brown v. Texas*, 443 U.S. 47, 52 (1979) ("When . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits").

In subsequent cases, the Court, following the rationale in *Scott*, used an objective test and expressly rejected any inquiry into an officer's subjective motivation to determine whether police conduct violated the Fourth Amendment. For example, in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), involving a motion to suppress narcotics found on a ship, the Court summarily rejected as "incongruous" defendants' claim "that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation." *Id.* at 584 n.3. Thus, the Court found it irrelevant that the inspection was motivated by a "hunch" the ship was smuggling marijuana or that the state police officer was present solely for that reason; what mattered was that the agents had a legitimate reason to be on the vessel at the time that probable cause to search for drugs developed.

In *Maryland v. Macon*, 472 U.S. 463 (1985), involving a motion to suppress the warrantless seizure of pornographic magazines, the Court stated, "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of

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whereas the danger of destruction of the evidence is identical if the officers must depart and secure a warrant. *Id.* at 139.

the facts and circumstances confronting him at the time,' [citation omitted], and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* at 471.

In *Graham v. Connor*, 490 U.S. 386 (1989), involving a personal injury suit arising from a traffic stop, the Court observed that a "test, which requires consideration of whether the individual officers acted in 'good faith'. . . is incompatible with a proper Fourth Amendment analysis," because it "puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment. . . . The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts . . . have no proper place in that inquiry." *Id.* at 397-398.

In *Horton v. California*, 496 U.S. 128 (1990), the Court employed the objective test when revisiting the "plain view" doctrine.

> First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. . . . [¶] Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no

> warrant issue unless it 'particularly describ[es] the place to be searched and the persons or things to be seized,' [citations and footnote omitted], and that a warrantless search be circumscribed by the exigencies which justify its initiation. [Citations].

Id. at 138-140.

In sum, the Court has consistently endorsed an objective standard to determine Fourth Amendment search and seizure issues. In every instance the Court has specifically rejected inquiry into the police officer's subjective state of mind or motive for his or her actions.

Application of the purely objective test, also referred to as the "could have" or "legally authorized" test, to the very narrow question whether the initial stop of a vehicle is justified would be in harmony with the holding in *Scott* and its progeny. The test asks only whether the officer had a reasonable suspicion that the motorist violated a provision of the vehicle code or was otherwise engaged in criminal activity at the time of the stop. The test disregards the subjective motives of the officer for stopping the vehicle or any limitations of existing police practices with regard to such stops. *See United States v. Whren*, 53 F.3d at 371 ("The objective 'could have' standard provides a more principled method of determining reasonableness").

The purely objective test more effectively promotes an objective assessment of police officers' actions, pursuant to *Scott* and its progeny. It "eliminates the confusion and inconsistencies," inherent in the application of the reasonable officer standard. *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993) (en banc), *cert. denied*, 115 S.Ct. 97 (1994). It also ensures that the validity of traffic stops is not subject to the vagaries of police departments' policies and procedures

concerning the kinds of traffic offenses of which they ordinarily do or do not take note. *Id.*

"The Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense is a minor one." *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C.Cir. 1991). An officer who makes a traffic stop based on probable cause acts in an objectively reasonable manner. *United States v. Ferguson*, 8 F.3d at 390. The objective test does not require an officer's state of mind to perfectly match his legitimate actions. *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 428 (1991). Thus, when the police are doing "no more than they are legally permitted and objectively authorized" to do, the resulting stop or arrest is constitutional. *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), *remanded*, *affirmed* 925 F.2d 1064, 1065, (7th Cir. 1991), *cert. denied*, 112 S.Ct. 428 (1991).

The overwhelming majority of federal appellate courts has adopted the purely objective standard. *United States v. Botero-Ospina*, 71 F.3d at 787 (a traffic stop is valid if based on an observed traffic violation or on a reasonable articulable suspicion the violation has occurred); *United States v. Scopo*, 19 F.3d 777, 782-784 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 207 (1994) (legal authorization test ensures traffic stops are "not subject to the vagaries of police departments' policies and procedures"); *United States v. Ferguson*, 8 F.3d at 391 ("traffic stops based on probable cause, even if other motivations existed, are not illegal"); *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1374 (1994) ("We adopt the objective test . . . that when an officer observes a traffic offense or other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment"); *United States v.*

Cummins, 920 F.2d at 500 ("The [High] Court's language leaves little doubt that 'the officer's actual state of mind at the time the challenged action was taken' [citations] is of no significance in determining whether a violation of the Fourth Amendment has occurred"); *United States v. Trigg*, 878 F.2d at 1041 (the High Court's language dictates "a purely objective inquiry in evaluating the reasonableness of a particular police activity"); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) ("so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry"); *United States v. Hawkins*, 811 F.2d 210, 212 (3rd Cir. 1987), *cert. denied*, 484 U.S. 833 (1987) ("The *Scott/Macon* principle [is] that a Fourth Amendment inquiry focuses on the objective facts known to the officer rather than the seizing officer's state of mind").

By adopting the purely objective test, the Court will adhere to the well-established rule, beginning with *Scott*, of relying on objective criteria to assess the constitutionality of police conduct.

B. <u>The Modified Objective Test, With Its Inquiry Into "Usual Police Practices," Has Proven To Be Impossible to Apply</u>

Under the modified objective test espoused by petitioners, the reviewing court must make a two-step inquiry. First, the court must decide whether a vehicle code violation occurred. If it did, the court must then determine whether the detaining officer was justified in stopping the vehicle under "usual police practices." *See United States v. Ferguson*, 8 F.3d at 387 (the "would have" test examines the traffic violation in terms of the arresting officer's duties at the time of the stop and the general police practice or routine for enforcing that

violation); *United States v. Millan*, 36 F.3d 886, 889 (9th Cir. 1994) (since stop of vehicle for cracked windshield was suggested by drug interdiction officer with no traffic-related duties, the stop was pretextual); *compare United States v. Whren*, 53 F.3d at 376 (since the officers observed the vehicle code violations, the court's inquiry "need go no further").

The difficulty of applying the modified test to traffic stops is illustrated by the experience of the Tenth Circuit, which adopted the modified or reasonable officer test nearly a decade ago in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), but which recently rejected it as "unworkable." *United States v. Botero-Ospina*, 71 F.3d at 786.

In *Guzman*, the court, relying on *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986), adopted the reasonable officer test and focused on the usual practices of the state police in making traffic stops. The court held the inquiry should be whether the officer making the stop had "deviated from the usual practice" of the police officers in the state. *Id.* at 1517. The court reasoned, "in the absence of standardized police procedures that limit discretion," whether a motorist is detained and subjected to lengthy interrogation turns on no more than the officer's mood or the motorist's appearance. *Id.* at 1516; *see United States v. Hernandez*, 55 F.3d 443, 445 (9th Cir. 1995) ("we often find it helpful to determine whether the stop conformed to regular police practices," citing *Smith* and *Guzman*).

In light of the decision in *Guzman*, courts in the Tenth Circuit were forced to determine the meaning of "usual police practices." The problem was that several different meanings emerged. For example, in *Guzman*, the court defined usual police practices in terms of an entire state police force. *Id.* at 1518. In *United States v. Working*, 915 F.2d 1404, 1408 (10th Cir. 1990), and

United States v. Harris, 995 F.2d 1004, 1006 (10th Cir. 1993), however, the court defined usual practices as common practices of particular officers. And in *United States v. Fernandez*, 18 F.3d 874, 877 (10th Cir. 1988), the court defined usual practices by a particular unit of the highway patrol.

Given the conflicting meanings of the phrase "usual police practices," there was little if any consistency in the application of the reasonable officer test.[3] It was precisely for that reason that the Tenth Circuit, on its own motion en banc, overruled *Guzman* in *United States v. Botero-Ospina*, 71 F.3d at 787.[4] The court adopted the purely objective test, espoused by respondent here.

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3. A leading proponent of the reasonable officer test, with its reliance on standardized police practices, has recognized it would be "difficult to administer." See 3 W. LaFave, *Search and Seizure*, § 7.5(e) (3rd ed. 1996) at 592 ["a pretext rule (focusing not on motivation but on departure from established practice) is difficult to administer when it cannot easily be determined that there is an established practice against which to test the police conduct in a particular case"].

4. In *Botero-Ospina*, a Utah County Sheriff's Deputy stopped a swerving car to ensure the driver was not falling asleep or intoxicated. *Id.* at 785. During the stop, the driver's evasive answers led the officer to ask for permission to search the car, which was granted. *Ibid.* The officer found 74 kilograms of cocaine hidden in the car. *Ibid.*

The court affirmed the district court's denial of the motion to suppress because the officer had observed defendant "straddling the lane" and reasonably believed he might also be driving under the influence of alcohol, in violation of the state vehicle code. *Id.* at 788.

The court noted that test (1) more effectively promotes an objective assessment of police officers' actions, pursuant to the analysis in *Scott*; (2) eliminates the confusion and inconsistencies inherent in the application of the *Guzman* standard; (3) ensures that the validity of traffic stops "'is not subject to the vagaries of police departments'" policies and procedures concerning the kinds of traffic offenses of which they ordinarily do or do not take note; and (4) leaves to the state legislatures the task of determining what the traffic laws ought to be, and how those laws ought to be enforced. *Id.* at 788, *citing United States v. Ferguson*, 8 F.3d at 392. The court in *Botero-Ospina* concluded, "[t]ime has proven the *Guzman* standard unworkable . . . [and] its application has been inconsistent and sporadic." *Id.* at 786.

Only two courts, the Ninth and Eleventh Circuits, now adhere to the modified objective, or "would have" test. *See United States v. Hernandez*, 55 F.3d at 446 (reversed because no reasonable officer would have stopped defendant for illegal parking); *United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991) (reversed because reasonable officer would not have stopped defendant's vehicle).

Even so, the Ninth Circuit has expressed doubt and confusion about how to interpret the test. For example, in *United States v. Hernandez*, 55 F.3d at 445, the court noted other courts in the circuit had "found the case law confusing" when analyzing the reasonable officer test. *Id.* at 445, citing *United States v. Perez*, 37 F.3d 510 (9th Cir. 1994) ("Our circuit's caselaw has not been entirely consistent in the test it has applied to determine pretext") and *United States v. Millan*, 36 F.3d 886 (9th Cir. 1994) (same); *see United States v. Cannon*, 29 F.3d 472 (9th Cir. 1994) ("Devising appropriate and workable formulas for limiting police discretion has proved difficult, and circuit courts now conflict on the proper

standard for evaluating 'pretextual stop' claims"). The dissent in *Hernandez* reiterated that "our prior cases demonstrate some confusion about the proper test for determining whether a stop is pretextual." *Hernandez*, 55 F.3d at 445 (Wiggins, J., dissenting).

The uncertainty inherent in allowing the usual police policies and practices of individual communities or states, or the usual policies and practices of individual law enforcement bodies, or even of individual officers, to determine the scope and application of the Fourth Amendment under the reasonable officer standard requires that this Court establish a clear and consistent rule. Without such a clear and consistent rule, based, as we have urged, on an objective assessment of the officer's conduct, trial courts will be compelled to hold hearings in every case to determine what the usual police policies and practices are in any given situation, assuming they even exist. The difficulty in application of such a standard will continue. It will ensure a multiplicity of rules and resolutions of Fourth Amendment claims that will result in a body of Fourth Amendment law dependent entirely on the highly individualized determination of what constitutes adherence to, rather than departure from, the usual practice of the law enforcement body or individual in question. The result will be a body of Fourth Amendment law created in the trial court by the trial court, without regard to the inconsistency, and consequent arbitrariness, of resolution of Fourth Amendment claims. This Court will have thus effectively abandoned its determination of the proper application of the Fourth Amendment in an area of law that is perhaps unique in the breadth of its application.

Because of the need to determine in each case the relevant policies and practices, the "modified" objective test amounts to nothing more than a subjective test in disguise. The test in essence focuses the inquiry

on objective evidence of the acting officer's *subjective* state of mind. As the court in *United States v. Scopo*, 19 F.3d at 783, correctly observed, "the 'usual police practices' approach is not a wholly objective test, because it requires a reviewing court to look into the motivations and hopes of an arresting officer."

What the modified or reasonable officer test attempts to do is divine a reasonable officer's subjective motivation under similar circumstances. A significant factor in this determination is the arresting officer's allegedly invalid purpose, i.e., his or her subjective motivation. *See, e.g., United States v. Hernandez*, 55 F.3d at 447 (if a reasonable officer would have made the stop anyway, it is not pretextual); *United States v. Valdez*, 931 F.2d 1451 (officer testified he normally would not have stopped a car for the traffic violation); *United States v. Smith*, 799 F.2d 704, 710 (11th Cir. 1986) (not reasonable for officer to stop car for minor traffic offense).

Thus, although the reasonable officer test purports to be objective, the analysis is not so different from a purely subjective approach. As the court in *United States v. Ferguson*, 8 F.3d at 391, concluded, "we find it difficult to distinguish, for example, between the officer's subjective intent and the 'objective evidence' of the officer's actual interest in investigating the kind of offense for which he made the stop."

In short, adoption of the purportedly "objective" reasonable officer test, as petitioners urge the Court to do, would signify a clear break with a long line of Fourth Amendment cases, beginning with *Scott*, that have consistently held that an officer's actual state of mind does not determine the reasonableness of his or her actions. It would also ensure a vast and inconsistent body of Fourth Amendment law, not only from jurisdiction to jurisdiction, community to community, but

even from officer to officer. The test espoused by petitioners must therefore be rejected.

C. The Fourth Amendment Adequately Protects Against Potential Abuse Arising From A Traffic Stop

The whole notion of when a traffic stop is or is not "pretextual" hinges on the subjective intent of the officer for stopping the vehicle. Since *Scott* and its progeny have "cast substantial doubt upon the continued validity of the subjective intent approach," *United States v. Trigg*, 878 F.2d at 1041, amici curiae believe the time has come for the Court to repudiate the doctrine of pretextual traffic stops. The same objective standard that is used to determine the constitutionality of police conduct in other Fourth Amendment areas should now be applied to traffic stops. *See United States v. Trigg*, 925 F.2d at 1065 ("We recognize that such an approach virtually eliminates the concept of a 'pretext arrest'. . ."); *United States v. Botero-Ospina,* 71 F.3d at 795 (Lucero, J., dissenting) ("The pretext doctrine is expressly abandoned"). No exception should be made for traffic stops because of the purported danger that "thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop." *United States v. Cannon*, 29 F.3d 472, 475 (9th Cir. 1994), *citing United States v. Guzman*, 864 F.2d at 1516.

The danger is overstated. The court in *Botero-Ospina* found an ordinary traffic stop was analogous to an investigatory detention under *Terry v. Ohio*. *United States v. Botero-Ospina,* 71 F.3d at 786. The court also noted that the concerns regarding "the arbitrary exercise of discretionary police power" were addressed by "the vast body of law" resulting from the second prong of the

Terry analysis, i.e., "whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place." *Id.* at 788. The court concluded, "well-developed case law clearly circumscribes the permissible scope of an investigative detention," and thus a stop justified by an observed traffic violation, but "motivated by a desire to engage in an investigation of more serious criminal activity," is "circumscribed by *Terry*'s scope requirement." *Ibid.* That conclusion is well-founded.

The notion of pretextual stops and arrests originated in *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932), in which the court stated that "[a]n arrest may not be used as a pretext to search for evidence." The concerns expressed in *Lefkowitz* are no longer with us. Over the next sixty years, the Court enhanced the protections against unreasonable search and seizure in general. *See Chimel v. California*, 395 U.S. 752 (1969) (limited the scope of a premises search incident to an arrest); *Payton v. New York*, 445 U.S. 573 (1980) (prohibited warrantless home entry to effectuate an arrest); *Steagald v. United States*, 451 U.S. 204 (1981) (prohibited warrantless home entry to arrest a non-occupant).

The Court also enhanced the protections against unreasonable search and seizure during traffic stops. In *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), the Court limited the use of random vehicle stops to enforce compliance with auto registration and safety laws. In *Michigan v. Sitz*, 496 U.S. 444, 451 (1990), the Court upheld the use of sobriety checkpoints to investigate drunk driving since detention of particular motorists for field sobriety tests may require individualized suspicion. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975), the Court limited the use of roving patrol stops

absent a reasonable, articulable suspicion the vehicle contained aliens.

Once a vehicle is stopped the officers do not automatically have the right to search it or its occupants. Although officers may rightfully observe from their vantage point anything in plain view, the Court has permitted a search of the vehicle only if one of several additional factors arises. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (officers must have a reasonable and articulable suspicion the occupant is dangerous and may gain control of a weapon before they could search the passenger area of a car); *New York v. Belton*, 453 U.S. 454, 462 (1981) (defined the scope of a search of the passenger area of a car incident to a lawful arrest of the occupants of the car); *United States v. Ross*, 456 U.S. 798, 800 (1982) (officers must have probable cause to believe the vehicle contained concealed contraband before they could search it and its contents); *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976), and *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (officers must follow standard impound and inventory procedures in order to search the vehicles).

A lawful traffic stop is not, as proponents of the reasonable officer test argue, a carte blanche for an officer to engage in an unjustified search. Having stopped the vehicle for a traffic violation, the officer may thereafter proceed only in a manner consistent with established limitations on the exercise of his authority. Moreover, as the court in *United States v. Scopo* made clear, "[t]hough the Fourth Amendment permits a pretext arrest [or stop], if otherwise supported by probable cause, the Equal Protection Clause still imposes restraint on impermissibly class-based discriminations." *United States v. Scopo*, 19 F.3d at 786 Newman, C.J., conc.

In short, the Court has so refined the protections regarding searches incident to arrest and detention under the Fourth Amendment that the pretext doctrine has lost much of its urgency. It is nothing more than a vestigial organ in the body of Fourth Amendment analysis.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed on the ground the officers lawfully stopped petitioners' vehicle for observed vehicle code violations.

Respectfully submitted,

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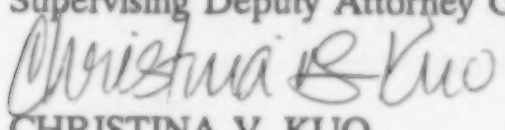

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March 14, 1996

AMICUS CURIAE

BRIEF

No. 95-5841

(13)

IN THE SUPREME COURT

OF THE

United States

OCTOBER TERM, 1995

MICHAEL A. WHREN AND JAMES L. BROWN
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Appellate Committee of the California District Attorney's Association

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INTRODUCTION

The amicus curiae, California District Attorney's Association of California, respectfully submits this brief in support of Respondent, United States of America, pursuant to Rule 37, Section 4 of the Rules of the Supreme Court of the United States. Consent to file has been granted by Counsel for Petitioners and the Respondent. Letters of Consent of all parties have been filed with the Clerk of this Court, as required by the Rules.

STATEMENT OF INTEREST

The Appellate Committee of the California District Attorney's Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorney's Offices throughout the state for the purpose of presenting their views in cases which have major statewide impact upon the prosecution of criminal offenses. The issue of what standard of review must be used when courts are presented with a claim of an alleged pretextual traffic stop is an issue that confronts prosecutors across our state every day. It is important that the standard adopted be one that provides law enforcement with practical and workable guidelines. The proper resolution of this case is, therefore, a matter of deep concern to the CDAA and its members.

SUMMARY OF ARGUMENT

The objective approach to alleged pretext traffic stops taken by the court of appeal is easily understood and applied. If a stop is supported by objective facts establishing a requisite level of suspicion, no further inquiry is required.

In contrast, the "would have" approach, advocated by petitioner and allied amici, is unworkable. It requires that courts go beyond deciding whether there were sufficient facts supporting the officer's belief that a crime was committed. It requires courts to venture into the realm of deciding whether a hypothetically reasonable officer "would have" made the stop in the absence of some purpose other than to investigate the offense that provided the objective justification for the stop.

Application of this approach has been inconsistent. Courts do not agree on what factors may be considered in assessing the reasonableness of a stop under the "would have" test. Often, courts purporting to look at whether an officer was following routine or usual practices do not, in fact, do so. Other courts purporting to apply the test, actually apply a traditional reasonable suspicion analysis. While courts adopting the "would have" test claim it is an objective test, they often take into consideration factors bearing on the subjective motivation of the investigating officer. Even courts which agree that the focus should be on whether the officer followed routine or usual practices, disagree on the appropriate reference group for determining what is the routine or usual practice. Ultimately, adoption of the test will generate far more confusion than conclusion.

To the extent the "would have" test requires standardized procedures for each and every of the myriad of traffic regulations, it is unrealistic. Requiring police departments to draw up such standardized policies would be detrimental to effective law enforcement.

The "purely objective" approach is consistent with the objective approach taken by this Court in assessing the

constitutionality of searches or seizures in analogous contexts. The "would have" test is inconsistent with the objective approach because, at bottom, it is concerned with the subjective motivations of police officers.

The "purely objective" approach is consistent with the approach this Court adopted in *Terry* when assessing limited seizures. The "would have" test requires this Court to add a new unnecessary level of scrutiny to the *Terry* analysis.

The "purely objective" approach satisfactorily limits an officer's discretion in the manner implicitly approved by this Court in *Delaware v. Prouse*, 440 U.S. 667 (1979) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The "would have" test requires this Court to put the kind of limits on an officer's discretion that this Court has saw fit to impose only when allowing searches or seizures that need not be supported by a requisite level of criminal suspicion.

Police discretion is also restricted by the fact that a traffic stop is a limited intrusion, the scope of which is carefully circumscribed. Legislatures also are in a position to limit police discretion where there is a fear of potential abuse.

The "would have" test cannot logically be limited in application to minor traffic stops. Hence, the test has the potential to force an unprecedented and unwarranted change in all Fourth Amendment jurisprudence. Moreover, it is unnecessary to adopt the "would have" test in order to prevent discriminatory enforcement of the law.

ARGUMENT

I.

THIS COURT SHOULD USE A "PURELY OBJECTIVE" APPROACH WHEN CONSIDERING ALLEGATIONS THAT A DEFENDANT WAS STOPPED FOR PRE-TEXTUAL REASONS

A. The "Purely Objective" Approach Adopted by the Court of Appeal is Easily Applied: The Alternative Approaches Advocated by Petitioner and Allied Amici Are Not.

1. The "Purely Objective" Approach

We ask this Court to adopt the following standard for assessing the constitutionality of an alleged pretextual traffic stop:

> "a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring."

United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (*en banc*). Under this standard, the subjective intent of the investigating officer, the general practice of the police department, and the general practice of the investigating officer are all irrelevant. The seizure remains valid even if the officer would have ignored the traffic violation but for any suspicions unrelated to the traffic violation. *See United States v. Scopo*, 19 F.3d 777, 784 (2nd Cir.), *cert. denied*,

115 S.Ct. 207 (1994); *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir.) (*en banc*), *cert. denied*, 115 S.Ct. 97 (1994).

In adopting this standard, the court of appeal referred to it as the "could have" test. *United States v. Whren*, 53 F.3d 371, 376 (D.C. Cir. 1995). The standard has also been referred to, inter alia, as the "authorization" approach or the "purely objective" test. *See, respectively, United States v. Scopo*, 19 F.3d at 784; *United States v. Hassan-El*, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1374 (1994).[1] Nevertheless, despite the difference in nomenclature, and some variation in the language used by courts in defining the approach, the difference is one of semantics. The end result is the same: if the stop is supported by the requisite level of suspicion, no further inquiry is required.

The "purely objective" approach is easily applied and understood. Either there *are* or there *are not* sufficient facts supporting the officer's belief that a violation of the law has occurred or is occurring.

2. The Approaches Advocated by Petitioner and Allied Amici

Petitioner and allied amici recommend that this Court reject a "purely objective" approach. They argue that this Court should adopt a version of what is commonly referred to as the "would have" test. *See*, *Petitioner's Brief on the Merits* at 32; *Brief of the American Civil Liberties Union as*

[1]Because the term "purely objective" approach most accurately characterizes the essence of the test, we adopt it for purposes of this brief. We decline to refer to the approach as the "could have" test because that designation conveys the erroneous impression that a stop can be justified by a post-stop determination that the officer could *theoretically* have stopped the suspect for a traffic violation, even though the officer did not notice the violation until after the initial stop was made. *See United States v. Ferguson*, 8 F.3d at 391.

Amicus Curiae (hereinafter "*ACLU Amicus*") at 15; *Brief of the National Association of Criminal Defense Attorney's* (hereinafter "*NACDL Amicus*") at 6-7. Most courts which use this approach have defined it in language similar to the following: "the proper inquiry . . . is not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the seizure in the absence of the invalid purpose." *United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991).[2]

Similarity in definition, however, has not resulted in similarity of application. In contrast to the "purely objective" approach, it is difficult to put a finger on just what a court is supposed to do under the "would have" approach. A review of the cases in which courts have tried to apply the "would have" test reveals the amorphous nature of the test as well as the inconsistency in its application. *See United States v. Botero-Ospina*, 71 F.3d at p. 786. *See also United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1993) [using test but openly recognizing inconsistency with which it has been applied].

For example, many courts applying the "would have" test rely on their own intuitive sense of what is reasonable police work, regardless of whether any testimony concerning standardized procedures or usual practices has been elicited. *See*, *United States v. Perez*, 37 F.3d at 513; *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994); *United States v. Betancur*, 24 F.3d 73, 77 (10th Cir. 1994); *United States v. Mans*, 999 F.3d 966, 968 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 567 (1993); *United States v. Patterson*, 993 F.2d 121, 123 (6th Cir. 1993); *Thanner v. State*, 611 A.2d 1030, 1037, 93 Md.App. 134, 141 (Md. Ct.Spec.App. 1992); *State v. Whitsell*, 591 N.E.2d 265, 273, 69 Ohio App.3d 512, 524 (Ohio Ct.App. 1990); *State v. Smith*, 119 Utah Adv.Rep 837, 81 P.2d 879, 883 (Utah Ct.App. 1989); *Limonja v.*

[2]The test assumes that, in some instances, police will ignore their general obligation to enforce the law.

Commonwealth, 8 Va.App. 532, 539, 383 S.E.2d 476, 480 (Va. Ct.App. 1989), *cert. denied*, 495 U.S. 905 (1990); *State v. Bostic*, 637 So.2d 591, 594 (La. Ct.App. 1994); *Taylor v. State*, 111 Nev. 1253, 903 P.2d 805, 807-808 (Nev. Sup.Ct 1995); *State v. Turner*, 1994 Ohio App. Lexis 2792 at *9 (Ohio Ct.App. 1994).

Other courts adopting the "would have" test actually apply a *de facto* "reasonable suspicion" analysis. That is, they invalidate the stop as pretextual largely because there was insufficient evidence to create a reasonable suspicion of illegal activity. *See, e.g., United States v. Hernandez*, 55 F.3d 443, 446 (9th Cir. 1995) [pretext found because no right to detain defendant for illegally parking *outside* business district where car was parked next to several businesses]; *United States* v. *Millan*, 36 F.3d 886, 891 (Holcomb, J., concurring) (9th Cir. 1994) [stop for cracked windshield pretextual because cracked windshield not illegal and insufficient evidence damage created safety hazard]; *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993) [stop deemed pretextual where not objectively reasonable for officer to suspect driver intoxicated based simply on weaving within lane and failure to make eye contact with officer]; *Tarwid* v. *Georgia*, 184 Ga.App. 853, 854, 363 S.E.2d 63, 64 (Ga. Ct.App. 1987) [stop held pretext where driver, who had just received a warning citation by officer who reported no signs of intoxication, was stopped by another officer for traveling slightly *under* maximum speed limit].)

Some advocates of the "would have" test vigorously assert that the test does not require courts to examine the actual motives of investigating officer. Yet, at least one advocate of the "would have" test has admitted that "the standard requires the Court to give at least partial consideration to the officer's motives in making an arrest." *Crittendon v. State*, 899 S.W.2d 668, 679-680 (Baird, J.,

dissenting)[3]

Moreover, the factors considered by courts applying the "would have" test are often indistinguishable from the factors considered by courts which overtly adopt a subjective test. In *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968), one of the cases most commonly cited as using an openly subjective approach, the court relied upon the following factors in finding the stop pretextual: the defendant was under surveillance as a narcotics suspect; the officer admitted that the real reason for the stop was to search for narcotics; evidence that the officer did not normally make traffic arrests; evidence that no traffic citation was issued at the time of the arrest; and the delay between the initial observation of the violation and the stop. *Id.*, at 313-314. Identical, or functionally identical, factors are used by courts who subscribe to the "would have" approach. *See, e.g., United States v. Millan*, 36 F.3d at 889 [considering, inter alia, testimony of investigating officer that he had received training on how to use traffic stops to investigate other crimes and fact stop was suggested by officer from another agency with no traffic-related duties]; *United States v. Fernandez*, 18 F.3d 874, 887 n. 2 (10th Cir. 1994) [considering actual officer's lack of memory regarding a defendant's response as factor in finding stop pretextual]; *United States v. Lyons*, 7 F.3d at 976 [considering officer's actual behavior after stop in finding "the motivation for the stop was something other than (the defendant's) ability to drive"]; *United States v. Valdez*, 931 F.2d at 1451 [considering patrol officer's admissions he would not have made stop unless instructed by narcotics unit to do so]; *United States v. Harris*, 928 F.3d 1113, 1116 (11th Cir. 1991) [considering, inter alia, whether officer actually conducted investigation for DUI after stop];

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[3]On the other hand, one court purporting to apply the "would have" test has, in effect, applied a "purely objective" test. *See, e.g., Poindexter* v. *Commonwealth*, 16 Va.App. 730, 432 S.E.2d 527, 529 (Va. App. 1993).

United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987) [considering officer's admissions he would have made stop regardless of traffic violation and fact officer began pursuing driver before seeing traffic violation]; *United States v. Smith*, 799 F.2d 704, 710-711 (11th Cir. 1986) [considering, inter alia, whether officer began pursuit before seeing violation, whether officer made any attempt to investigate DUI after stop, and whether statements of officer on stand indicated officer not really concerned with traffic safety]; *State v. Newell*, 1995 Ohio App. Lexis 5665 at *7 (Ohio Ct.App. 1995) [considering officer's post-stop actions, including bringing drug sniffing dogs to scene]; *City of Dayton* v. *Erickson*, 1995 Ohio App. Lexis 999 at *8 (Ohio Ct.App. 1995) [considering officer's statement he originally intended to stop car on suspicion driver was unlicensed where stop was for signal violation]; *State v. Blumenthal*, 78 Wash.App. 82, 86, 895 P.2d 430, 435 (Wash.Ct.App. 1995) [considering, inter alia, whether officer followed car for an unreasonably long time, and whether assigned to a duty in which traffic stops would be unusual]; *State v. Marshall,* Utah Adv.Rep. 45, 791 P.2d 880, 883 (Utah Ct.App. 1990) [taking into account that officer "was not suspicious of [the driver] for other reasons before the stop, had not followed him in order to find some reason to pull him over, and, before the alleged violation occurred, had not radioed for help"]; *State v. Bishop*, 95 Ohio App.3d 619, 622, 643 N.E.2d 170, 172 (Ohio Ct.App. 1994) [considering, inter alia, that officer followed car before seeing violation and did not issue citation for traffic offense].

Some courts applying the test have even ignored testimony that the officer complied with his usual practice and ruled the stop invalid based solely on a gut belief that the stop was a pretext. *See State v. Lakes*, 1995 Ohio.App. Lexis 5274 (Ohio Ct.App. 1995); *State v. Haskell*, 645 A.2d 619 (Me. 1994).

Even among courts that decide the case based on whether the officer complied with routine or usual practices,

there is disagreement over the relevant reference group. For example, numerous courts have decided the propriety of an alleged pretextual stop by looking at what is the individual officer's *own* usual practice. *See, e.g., United States v. Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990); *United States v. Bates*, 840 F.2d 858, 860 (11th Cir. 1988); *State v. Izzo*, 623 A.2d 1277, 1280 (Me. 1993); *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700, 703 (N.C. Ct.App. 1992). Yet, other courts have viewed the ordinary practices of the investigating officer as insignificant. *See United States v. Greenspan*, 26 F.3d 1001, 1005 (9th Cir. 1994); *United States v. Fernandez*, 18 F.3d at 87; *United States v. Guzman*, 864 F.2d 1512, 1518 (10th Cir. 1988). Similarly, some courts define the reasonable officer by considering what officers in the same *unit* would do. *See United States v. Fernandez*, 18 F.3d at 877. While other courts take into consideration what officers in the same *state* would do. *See United States v. Guzman*, 864 F.2d at 1518. In *United States v. Robles-Alvarez*, 1996 U.S. App. Lexis 1518, (9th Cir. 1995), the court held that, so long as traffic enforcement was within the scope of the particular officer's scope of duties, his actions were to be measured against what a reasonable police officer *in general* would do, as opposed to what a reasonable officer in the same unit as the investigating officer would do.

In addition, courts using the "would have" test have taken different approaches regarding the extent of the inquiry that may be made in adducing what is standard or routine practice. Some courts suggest it be done in a cursory fashion. *See, e.g., State v. Chapin*, 75 Wash.App. 460, 468 n. 16, 879 P.2d 300, 305 (Wash Ct.App. 1994) [noting that the officer's testimony as to the standard practice should suffice]. Other courts have permitted extensive research into the practices of the arresting officer or officers in the same unit as the arresting officer. *See, e.g., United States v. Fernandez*, 18 F.3d at 877 [evidence introduced that investigating officer made 63 warning stops for tinted windows; another officer in unit issued no warnings, two other officers issued one

warning, one officer issued three warnings, and one officer issued 20 warnings]; *United States v. Wilson*, 853 F.2d 869, 875-876 (11th Cir. 1988) [records of all investigative activity of arresting officer and expert study on how fast vehicles travel on freeway introduced into evidence].

Because the "would have" test lacks a functional definition, should this Court chose to adopt the test, many of the following questions will have to be considered:

Is the "would have" approach a "totality of the circumstances" test or is it primarily a question of whether the officer was following standard practices?

If the test is a "totality of the circumstances" test, what factors may be considered? Should all the factors be given the same weight? If not, what factors should be given the most weight?

Should the court take into consideration factors bearing on the officer's subjective intent? Should it consider whether the officer was pursuing an investigation of the driver before making the stop? Should the court consider how long the officer followed the driver before observing the violation? Should the actions of the officer after the stop is made be considered? Should it matter whether the officer actually issued a citation for the violation? Is the officer's statement that he would not have made the stop absent an intent to investigate relevant?

If the test is primarily a question of whether the officer was following standard practice, is the officer's own individual practice relevant to determining whether the stop was pretextual? If so, is an officer's own practice more important than what the standard practice is for other members of his department?

Is the reference group for deciding what is the standard practice the specific unit to which the officer is assigned? Members of the same unit who patrol the same beat? Members of the same unit who patrol similar beats? The entire police department? Members of the police department who patrol similar beats? All police departments

in the same judicial district? All police departments in the same county? Or all police departments in the state?

If the arrest is made by a member of a statewide police department, is the reference group all state patrol officers? Just state patrol officers in the same station? Or state patrol officers in the same geographical division?

If the arrest is made by a member of federal law enforcement (i.e., the FBI, ATF, or DEA), is the reference group all federal law enforcement members? All members of the particular branch? All members stationed in the state where the stop occurred? All members stationed in the same office? All members assigned to a particular subdivision? Or all members of a particular subdivision assigned to a particular office?

If the reference group is other members of the unit, how is a "typical officer" to be defined? Is the stop deemed reasonable if most other members of the unit would have made the stop? If a substantial number of other members would have made the stop? If at least one other officer in the unit would have made the stop?

What happens if a minority of the members of the same unit would not have made the stop, but a majority of the members of the same department would have made the stop? Or vice versa?

Is the relevant group other members of the unit who have been on the force a comparable time? What happens if it is typical for rookies to make more traffic stops? Is the officer judged against the typical officer in his unit or against other rookies in the unit?

Does it make a difference whether the normal practice is to make such a stop at night or must the standard be defined by what normal practice is during the day?[4]

Does it make a difference at what point in an officer's

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[4]*See State v. Haskell*, 645 A.2d at 621 [pretext found where speeder stopped in early morning though officer testified he normally makes such stops late at night but not during the afternoon].

shift the stop takes place? What if a stop for a particular violation is made at the end of a shift and it is usual to make such stops, except when it is near the end of the shift?[5]

Can weather conditions factor in? Can the type of neighborhood factor in? Can the day of the week, week of the month, or month of the year be taken into consideration?

Can an officer who is off-duty ever be deemed to be acting according to standard practice?[6]

If a special unit was created by a local police department to engage in strict enforcement of the traffic laws as part of an overall strategy of drug interdiction[7], would alleged pretextual traffic stops by members of this unit be judged against the standard procedures of the entire department or the special unit?

What if the officers involved in the seizure belong to a task force using members from more than one agency?[8] What result if more than two officers make the stop?[9]

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[5]*See United States v. Millan*, 36 F.3d at 889 [magistrate took into account that stop for minor safety violation was made by officers "en route to their offices at the end of the workday" in finding pretext].)

[6]*See State* v. *Arroyo*, 102 Utah Adv.Rep. 34, 770 P.2d 153, 155 (Utah Ct.App. 1989) [finding pretext where officer making stop was off-duty].

[7]*See, e.g., United States v. Dunson*, 940 F.2d 989, 990-993 (6th Cir. 1991), *cert. denied*, 503 U.S. 941 (1992).

[8]*See United States v. Scopo*, 19 F.3d at 778 [where a suspected member of a criminal organization, was stopped for a traffic violation by surveillance officers belonging to a joint task force comprised of federal and local officers created to investigate the criminal organization and there was testimony that while task force members did not usually effect traffic arrests, part of their typical duties during a surveillance was to issue traffic summons].

[9]*See United States v. Greenspan*, 26 F.3d at 1003 [where one officer testified it was policy for state police to stop all speeders and he consistently stops speeders going 9 mph over the limit except when everybody in the flow of traffic going more than 9 mph over the limit and partner testified that he

Could a police department make it standardized procedure for officers to give priority to stopping those traffic violators who are suspected of more serious criminal activity?

What information is the defendant entitled to obtain in preparing for the motion to suppress? Standard policy manuals? Records concerning the number and kinds of citations issued by the individual officer? Records concerning the number and kinds of citations issued by other members of the officer's unit? Records concerning the number and kinds of citations issued by other members of the officer's department? Are each, or any, of these records relevant in deciding what is the standard practice? To what extent would these records be admissible?

Should the "would have" approach be limited to stops for "minor traffic offenses"? If so, what constitutes a "minor traffic violation"?

Are all infractions to be deemed minor offenses or can a misdemeanor be a minor offense? Will some infractions not be minor offenses?

Will some violations of the same infraction be deemed "minor" and others not? Will it be a "minor" violation to drive one mph but not ten mph over the speed limit?[10] Will it make a difference how far a person weaves out of the lane?[11]

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would not issue to speeding tickets to persons speeding 0-3 mph over the limit if that was speed of traffic flow].

[10]*Compare State v. Haskell*, 645 A.2d at 619 [pretext found where driver stopped for going 4 mph in a 55 mph zone] *with United States v. French*, 974 F.2d 687, 691-692 (6th Cir. 1992), *cert. denied*, 506 U.S. 1066 (1993) [no pretext found where car driven 7 mph over the speed limit in 65 mph zone].

[11]*Compare United States v. Lyons*, 7 F.3d at 976 [finding stop pretextual, as matter of law, where officer stopped driver on suspicion of DUI based, in part, on weaving within lane 3-4 times] *with United States v. Perez*, 37 F.3d at 513 [no pretext because even officers in drug interdiction unit would pull

If there is no line to be drawn between infractions and misdemeanors, does the court have to weigh the seriousness of the violation?[12]

In sum, while many courts claim to be using the "would have" approach, few actually venture into the quagmire of its practical application or engage in the type of review the standard truly demands.

B. The "Purely Objective" Approach Provides the Police with a Measure of Discretion That is Essential to Effective Law Enforcement: The "Would Have" Test Deprives the Police of this Essential Discretion

Petitioner complains that the use of automobiles is so heavily regulated "that it is impossible to operate them in strict conformity with each and every applicable regulation" *Petitioner's Brief on the Merits* at 21. Yet he expects police departments to develop standardized procedures for each of these numerous situations. Given the varied factual settings and different types of offenses, this is an unrealistic expectation.

> Common sense suggests that an officer may observe a large number of traffic violations in a given day and must make a choice as to which violators to stop and which ones not to stop. Any number of factors -- including legitimate policy considerations -- could influence an officer's decision to make a particular stop.

United States v. Fernandez, 18 F.3d at 889 n. 7 (Brown, J., dissenting). "Unlike a standard policy for inventory searches,

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over driver weaving back and forth across fog line].

[12]*See State v. Whitsell*, 591 N.E.2d at 273 [noting a police officer might overlook broken taillight but not a missing license plate].

situations concerning stops and arrests are not so readily standardized." (*Garcia v. State*, 827 S.W.2d 937, 942 (Tex.Crim.App. 1992). Rather, police departments give officers wide discretion to decide when, where, how, and who to stop.

To require police departments to adopt standardized policies comparable to those existing in the area of inventory searches would not only be next to impossible, it would be detrimental. Giving an officer a wide range of discretion in choosing how to best utilize his time and efforts in preventing crime is beneficial. We "'want officers to maximize their resources (including their activities within the Fourth Amendment) in pursuit of serious offenders.'" *State v. Lopez*, 237 Utah Adv.Rep. 9, 873 P.2d 1127, 1140 (Utah Ct.App. 1994).[13]

For example, it seems eminently reasonable to allow officers the option of enforcing the traffic laws, in a more restrictive fashion than is the usual practice, during those periods of the night when they are more likely to catch a drunk driver by doing so. Yet, under the "would have" test, this deviation in practice can render the stop invalid. *See State v. Haskell*, 645 A.2d at 619-622. Similarly, it seems both reasonable and good policy to give homicide detectives the discretion to serve outstanding non-homicide arrest warrants in order to increase their chances of solving a murder, even if serving such warrants is outside the scope of their normal duties. *See, e.g., People v. Hattery*, 183 Ill.App.3d 785, 817, 539 N.E.2d 368, 390 (Ill.App.Ct. 1989); *State v. Woods*, 117 Wis.2d 701, 712-713, 345 N.W.2d 457, 463-464 (Wis. 1984); *Aultman v. State*, 621 So.2d 353, 361 (Ala.Crim.App. 1992), *cert. denied*, 126 L.Ed.2d 354 (1993); *State v. Blair*, 691 S.W.2d 259, 262 (Mo. 1985), *cert.*

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[13]Moreover, even if such standardization of procedures for enforcement of traffic laws would be possible, such standardization would more likely be dictated by budget considerations than by what a police department necessarily believes to be the ideal operating procedures.

granted, 474 U.S. 1049, *dismissed*, 480 U.S. 698 (1987). Yet, under the "would have" approach, such behavior is condemned as unreasonable. *See United States v. Causey*, 834 F.2d 1179, 1186 (5th Cir. 1987) (Rubin, J., dissenting) [finding it unreasonable for officers to use old bench warrant to arrest robbery suspect].)

C. The Purely Objective Test is Consistent with this Court's Traditional Approach to Assessing the Constitutionality of Limited Seizures That Are Supported by Objective Facts Establishing a Requisite Level of Criminal Suspicion: The "Would Have" Test is an Unwarranted Departure From this Approach

1. Using the "Purely Objective" Approach in the Context of Alleged Pretext Stops is Consistent with this Court's Objective Approach to Assessing the Constitutionality of Searches or Seizures in Analogous Contexts

Over the past two decades, this Court has made it clear that the subjective intent of a police officer, engaged in a search or seizure for purposes of criminal investigation, is irrelevant where there are objective circumstances establishing the requisite level of suspicion. *See Horton v. California*, 496 U.S. 128, 131 (1990); *Maryland v. Macon*, 472 U.S. 463, 470 (1985); *United States v. Hensley*, 469 U.S. 221, 234-235 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 583-584 n. 3 (1983); *Scott v. United States* (1978) 436 U.S. 128, 137.

The rationale behind this focus on objective facts is easily understood:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured

> that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Scott v. United States, 436 U.S. at 137, *quoting Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). This evaluation cannot effectively be accomplished if courts are forced to rely "on standards that depend upon the subjective state of mind of the officer." (*Horton v. California*, 496 U.S. at 138.)[14]

This rationale is also consistent with those cases holding that an officer's good faith subjective belief cannot ***save*** a search or seizure that is not supported by objective circumstances establishing the requisite level of suspicion. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 97 (1964). After all, if an officer's subjective beliefs cannot turn a "good" seizure into a "bad" seizure why should his subjective beliefs be able to turn a "bad" seizure into a "good" seizure? *Cf., Graham v. Connor*, 490 U.S. 386, 397 (1989) ["officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's

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[14]Even when this Court has expressed concern over the abuse of police authority, it has not authorized courts to examine the state of mind of the investigating officer. For instance, in *Steagald v. United States*, 451 U.S. 204 (1981), this Court observed that if officers were allowed to serve arrest warrants for suspects in the homes of the third parties, it could lead to abuses by police seeking to search for illegal activity. *Id.*, at 215. However, this Court did not address its concern by authorizing courts to explore the state of mind of the officer serving the arrest warrant for hints that the warrant was being used as a means to surreptitiously search the house for evidence of an unrelated crime. Nor, for that matter, did it adopt a variation of the "would have" test (i.e., "would a reasonable officer have executed the warrant at the third party's residence in the absence of an ulterior motive"). Instead, this Court confirmed its rejection of a subjective approach by simply making a hard-line rule against police engaging in searches of residences pursuant to arrest warrants for non-residents. *Id.*, at 205.

good intentions make an objectively unreasonable use of force constitutional"].

In keeping with this Court's mandate, the "purely objective" test eliminates the necessity of inquiring, explicitly or implicitly, into an officer's subjective state of mind.

On the other hand, the "would have" test contravenes this principle. Close scrutiny of the "would have" approach reveals its ultimate purpose and effect is to inquire into the subjective state of mind of the officer actually making the stop. (*See United States v. Johnson*, 63 F.2d 242, 247 (3rd Cir. 1995), *pet. for cert. filed*, (1995); *United States v. Scopo*, 19 F.3d at 782. For example, in *United States v. Smith*, 799 F.2d at 914, the court said, "what turns this case is the overwhelming objective evidence that [the officer making the stop] had no interest in investigating drunk driving charges". But it is nigh impossible to draw a meaningful distinction between the subjective motivation of the police officer and the "objective evidence" of the "officer's actual interest in investigating the kind of offense for which he made the stop[.]" *United States v. Ferguson*, 8 F.3d at 391; *State v. Lopez*, 873 P.2d at 1138.

In substance, the "would have" approach just creates an irrebuttable presumption of "bad faith" whenever the officer acts outside the scope of what the court, in hindsight, deems to be the actions of a typical officer assigned to the same precinct and duties as the officer making the seizure. (*See United States v. Rusher*, 966 F.2d 868, 886 (Luttig, J., concurring) (4th Cir. 1992), cert. denied, 506 U.S. 926 (1992) [noting "would have" approach is a "subjective" standard "because it is fundamentally a rule that requires invalidation of objectively reasonable law enforcement actions, if by operation of the rule, the law enforcement officer is deemed to have acted out of pretextual motives"].

Even those courts which look strictly at whether the investigating officer followed usual departmental practices are still primarily attempting to penalize the actual officer making the stop for acting with an "unacceptable intent." *See United*

States v. Fernandez, 18 F.3d at 889 (Brown, J., dissenting) [noting that examination of the number of citations issued for the offense in question by members of the arresting officer's same unit is "in actuality nothing more than an inquiry into [the officer's] subjective state of mind when he made the decision to stop"].) Indeed, if punishing the officer for an improper subjective motivation is ***not*** actually the concern of the "modified objective" test, why does it matter whether another "hypothetical reasonable officer" would have made the stop absent such improper motivation? The real reason for considering normal practice and procedures is because "an improper or pretextual motive may be inferred where there is a discernible departure from them." *State v. Chapin*, 897 P.2d at 304; *State v. Blumenthal*, 895 P.2d at 433, n. 12;

2. The Purely Objective Approach is Consistent with the Test Adopted in *Terry* for Assessing the Constitutionality of Limited Seizures

Using the "purely objective" approach in the context of assessing the constitutionality of alleged pretextual traffic stops is also consistent with this Court's traditional approach to analyzing the propriety of limited seizures. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *United States v. Cortez*, 449 U.S. 411, 418 (1980); *Terry v. Ohio*, 392 U.S. at 22-23. Petitioner and allied amici contend that the standard adopted in *Terry*, ("would the facts available to the officer at the moment of seizure or search 'warrant a man of reasonable caution in the belief' that the action was appropriate"), lends support to their position that it is appropriate to look at factors other than whether there was sufficient objective evidence of criminality. They are wrong.

In *Terry*, this Court was not concerned with the question of whether an officer should or should not be investigating a particular type of crime. This Court was concerned with establishing the principle that the officer's

subjective state of mind is irrelevant in deciding whether the police action was reasonable, i.e., did the objective facts support a suspicion of criminal activity regardless of an officer's subjective good faith belief. *Id.*, at 22.

This Court did not specifically state what factors should be used in assessing whether a challenged police action was reasonable, but the only types of factors this Court actually took into account were (i) facts suggesting the suspects were engaged in criminal activity, (ii) facts suggesting the suspects presented a risk to the officer, and (iii) the manner in which the search and seizure was conducted, e.g., whether the scope of the search or seizure was related to the justification for the act's initiation. ***No*** mention was made that it would be appropriate to look at the types of factors used in the "would have" test such as (i) whether the officer would "routinely" have made the stop or (ii) the kind of duty the investigating officer was on at the time of the stop.[15]

This Court did not suggest that the exercise of the discretion to make a seizure based on objective circumstances showing unlawful activity is subject to constitutional scrutiny. The cases of *Wilson v. Arkansas*, 131 L.Ed.2d 976 (1995), *Tennessee v. Garner*, 471 U.S. 1 (1985), *Winston v. Lee*, 470 U.S. 753 (1985), and *Welsh v. Wisconsin*, 466 U.S. 740 (1984), relied upon by petitioner for the proposition that this Court will look beyond the existence of probable cause in assessing the reasonableness of a seizure are inapposite. *Petitioner's Brief on the Merits* at 16. All of them are concerned with the manner in which a search or seizure is carried out. None of the cases authorize restricting the discretion of the police to *make* the search or seizure.

While this Court has not hesitated to strike down vague or overbroad statutes that are defined in a manner

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[15]Nor for that matter, did *Terry* hint that the subjective motives of the police officer would be relevant in assessing the constitutionality of the stop.

encouraging "arbitrary and discriminatory enforcement," *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983), once a law is deemed to pass constitutional muster, the question of whether it should be enforced has not traditionally been one for the courts. "[C]ourts should leave to the legislatures the job of determining what traffic laws police officers are authorized to enforce and when they are authorized to enforce them." *United States v. Scopo*, 19 F.3d at 784; *United States v. Ferguson*, 8 F.3d at 391.

3. The "Purely Objective" Approach Limits Police Discretion in a Manner Implicitly Endorsed by this Court

We agree with the general proposition that the Fourth Amendment imposes a standard of "reasonableness" upon the exercise of discretion by government officials in order to guard against arbitrary invasions of privacy. *See Delaware v. Prouse*, 440 U.S. at 667; *United States v. Brignoni-Ponce*, 422 U.S. at 878. However, a traffic stop is not permitted unless the police can point to objective circumstances that establish a requisite level of suspicion. This requirement provides the necessary guard against arbitrary and indiscriminate seizures. The decisions in *Brignoni-Ponce* and *Prouse* implicitly recognize this proposition.

In *Brignoni-Ponce*, this Court decided the issue of whether roving patrols of border police could randomly stop vehicles when the only ground for suspicion was that the vehicle's occupants appeared to be of Mexican descent. This Court disapproved of such stops, stating that to allow such stops would subject individuals to "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.*, at 882. As a method of limiting the government's discretion, this Court required that there be reasonable suspicion that the vehicle contain illegal immigrants. This Court specifically held that the requirement of reasonable suspicion protected "residents

of the border areas from indiscriminate official interference." *Id.*, at 883.

In *Prouse*, this Court was faced with the question of whether to approve automobile stops for the purpose of checking licenses and registration where there was no reasonable suspicion that the car was being driven in violation of the law. *Id.*, at 650. Once again this Court voiced its concern that the discretion of the official in the field be "circumscribed, at least to some extent" and disapproved of the stop at issue. *Id.*, at 661. However, as in *Brignoni-Ponce*, this court only found the stop at issue to be unreasonable (i.e., lacking in safeguards against arbitrary government interference) because there was no requirement that the officer possess a requisite level of criminal suspicion. It was the ***absence*** of probable cause to believe that the driver was violating "any one of the multitude of applicable traffic and equipment regulations -- or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered" that rendered the stop unconstitutional. *Id.*, at 661.

Thus, this Court recognized that the risk of arbitrary enforcement is curtailed by the ability of the courts to invalidate searches or seizures which are not supported by objective facts establishing a violation of the law. It is only

> "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion' [that] other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

Id., at 664-665.

For example, this Court has been willing to consider alternative methods of curtailing the discretion of law enforcement in circumstances where governmental intrusions that need not be supported by some quantum of individualized criminal suspicion are permitted (i.e.,

inventory, regulatory, and border searches). These safeguards can take the form of restrictions on the scope of the search, requirements that the search be conducted pursuant to standardized or routine procedures, and/or, provisos that the searches must be conducted with at least *some* purpose to effectuate the ostensible purpose of the search. *See, e.g., Skinner v. Railway Labor Exec. Assn,* 489 U.S. 602 (1989) [allowing drug testing of railway employees absent reasonable suspicion because, inter alia, the circumstances justifying tests and permissible limits of the intrusion were "defined narrowly and specifically in the regulations that authorize them"]; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) [stopping cars at border checkpoints without reasonable suspicion of criminal activity permitted because done at fixed locations not designated by individual officers and under set regulations and limits]; *Florida* v. *Wells,* 495 U.S. 1 (1990) [opening of containers in inventory search permitted so long as standardized criteria or established routine exists to prevent use of exception for purposes of general rummaging].)[16]

But it is ***because*** these type of searches are free from the traditional impediments imposed by the Fourth Amendment against unreasonable searches and seizures that courts are permitted to look at other factors that can limit discretion. *See Delaware v. Prouse*, 440 U.S. at 663. When the police are constrained by the bulwark of individualized suspicion of criminal activity, it is redundant to require that the officer's decision to enforce a violation of law also conform to a hypothetical norm.

Moreover, it should also be kept in mind, that a traffic

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[16]While inventory searches sometimes *follow* a seizure that must be supported by a requisite level of criminal suspicion, they are often conducted without there being any suspicion of criminal activity on the part of the owner of the property searched (i.e., an abandoned car may be impounded and inventoried). In such circumstances, this Court has found it unhelpful to apply the standards used in assessing criminal investigations. *See Colorado v. Bertine*, 497 U.S. 367, 371 (1987).

stop is a very limited intrusion. A "traffic stop is presumptively temporary and brief." *Berkemer v. McCarty*, 468 U.S. at 437. Once a traffic stop is made, it does not, by itself, provide justification for further investigation. The scope of the stop "must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Thus, an officer may subjectively harbor a cornucopia of suspicions regarding the person he has detained but he cannot lawfully arrest the individual, conduct a general search, or do any of the things petitioner and allied amici are so worried about, unless there exists objective circumstances supporting each new level of intrusion. *Cf.*, *Horton v. California*, 496 U.S. at 139-140 [discarding of inadvertence requirement does not allow police to conduct general searches because, *inter alia*, a warrantless search must "be circumscribed by the exigencies which justify its initiation"].

Finally, restrictions on the scope of police authority during a traffic stop may also be imposed by state legislatures. *See, e.g.*, Cal. Pen. Code, § 853.5 [narrowing ability of officers to take persons arrested for infractions into custody]; Cal. Health & Saf. Code, § 11357(b) [narrowing ability of officers to arrest for misdemeanor possession of marijuana]; Cal. Veh. Code, § 40302 [narrowing ability of officers to make custodial arrests for most violations of the Vehicle Code]; Cal. Veh. Code, § 27315, former subd. (k) [deleted 1992: preventing detention of drivers solely for failure to wear seat belts]; *State v. Chapin*, 879 P.2d at 303 [noting decriminalization of most minor traffic offenses and prohibition against custodial arrest for such offenses unless defendant refuses to sign promise to appear].

4. The "Would Have" Test Carves Out a Special Rule for Inhibiting Police Discretion in the Context of Traffic Stops that Cannot Logically Be Limited to Traffic Stops

Petitioner argues that the "would have" test is needed

to curtail police discretion in the enforcement of traffic laws. Petitioner implies that the nature of traffic enforcement is somehow unique, and contrasts the enforcement of traffic laws with the enforcement of laws governing pedestrians. (*Petitioner's Brief on the Merits* at 22.)

However, from a theoretical standpoint, it will be difficult to limit the test to stops for traffic violations. Many of the same concerns about subterfuge and use of police powers for discriminatory purposes are present in other contexts.[17] In fact, courts have applied or contemplated applying a "would have" type analysis in a variety of different contexts including: where the suspect is detained for a non-traffic infraction, *see United States v. Mota*, 982 F.2d 1384, 1388 (9th Cir. 1993); where the suspect is arrested on a misdemeanor warrant, *see United States v. Causey*, 834 F.2d at 1179-1184; where the suspect is arrested on a felony warrant, *see State v. Towne*, 158 Vt 607, 627-630, 615 A.2d 484, 496-498 (Vt. 1992); where the suspect is arrested on a probation revocation warrant, *see State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991); where the suspect is arrested on a parole hold, *see State v. Archuleta*, 209 Utah Adv.Rep. 12, 850 P.2d 1232 (Utah 1993), *cert. denied*, 114 S.Ct. 476 (1993); where a home is searched in conjunction with an arrest on a warrant, *see State v. Jeney*, 163 Ariz. 293, 296-297, 787 P.2d 1089, 1091 (Ariz.Ct.App. 1987); and where a home is entered to arrest for a felony under exigent circumstances, *see United States v. MacDonald*, 916 F.2d 766, 770-772 (2nd Cir. 1990), *cert. denied*, 498 U.S. 1119

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[17]For example, police officers in large cities are given the discretion to decide which of hundreds or thousands of outstanding felony warrants should be served. *See, e.g., United States v. Causey*, 834 F.2d at 1190 (dissenting opinion, Rubin, J.) [noting that in 1986, there were 1,500 outstanding felony warrants in Indianapolis alone]. An officer who makes his decision to serve a warrant based on racial animus or other improper motive subjects the person named in the warrant to an even greater "arbitrary" intrusion than the person detained for a traffic offense.

(1991).

On the other hand, if the "would have" approach *is* limited to stops for "minor" traffic offenses, it will result in a strange paradox: the most *de minimus* of seizures being subjected to the greatest level of scrutiny.

5. The "Purely Objective" Approach Does Not Preclude Challenges to Discriminatory Enforcement of the Law.

The fear of discriminatory enforcement of the law is a genuine fear. The argument that use of a "purely objective" approach will allow police to selectively focus on individuals based on race or ethnicity is the most persuasive, albeit not conclusive, argument put forth by petitioner and allied amici. But there are a number of reasons why it is unnecessary to adopt the "would have" or other subjective-type approach in order to address the problem of discriminatory enforcement.

First, regardless of which approach is adopted by this court, it will and should always remain unconstitutional to detain a person simply because that person belongs to a particular racial or ethnic group. *See United States v. Brignoni-Ponce*, 422 U.S. at 886-887; *United States v. Fouche*, 776 F.2d 1398, 1402 (9th Cir. 1985), *cert. denied*, 486 U.S. 1017 (1988).

Second, even if a person's ancestry is not the only reason for a detention, an individual may still be entitled to redress if the detention is part of a concerted police effort to harass citizens based on invidious discrimination. *Cf.*, *United States v. Martinez-Fuerte*, 428 U.S. at 1133 n. 19 ["upon a proper showing, courts would not be powerless to prevent the misuse of checkpoints to harass those of Mexican ancestry"].

Third, states can enact legislation addressing the problem of discriminatory enforcement of the laws by the police. For example, in Minnesota, the Human Rights Act protects citizens against unfair discriminatory police practices. (*See*, Minn. Stat. § 363.03, subd. 4.) Citizens can bring suit

against the police for violations of the Act. Such a suit can be based on an allegation that a detention was conducted for racially-motivated purposes. *See State v. City of Mounds View*, 518 N.W.2d 567, 571-573 (Minn. 1994). Significantly, the Minnesota Supreme Court has held that in determining whether a traffic stop, allegedly conducted for racially-motivated purposes, violates the Human Rights Act, courts *can* consider whether the police acted in bad faith. *Id.*, at 572. Indeed, even investigatory stops that are deemed ***reasonable*** seizures under the Fourth Amendment will violate the Act if used as a "pretext for the malicious harassment of minorities." *Id.*, at 572 n. 9.

Fourth, the Equal Protection and Due Process clauses potentially provide grounds for suits against police officers who misuse their authority and engage in discriminatory enforcement of the law. *See United States v. Rusher*, 966 F.2d at 889 (Luttig, J., concurring and dissenting) [expressing concern that traffic stops may involve arbitrary abuses of governmental power, but noting due process clause and, where appropriate, the equal protection clause "constitute adequate protection and remedy against such abuses of the public's trust"]; *Shaw v. California Department of Alcoholic Beverage Control*, 788 F.2d 600, 610-611 (9th Cir. 1986) [former tavern owners have civil action against police department for racially discriminatory enforcement of the law in violation of equal protection]. As pointed out in the concurring opinion of Justice Newman in *United States v. Scopo*, 19 F.3d at 785:

> [T]he Equal Protection Clause still imposes restraint on impermissibly class-based discriminations. '[I]f [the law] is applied and administered by public-authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the

> Constitution.' *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-1073, 30 L.Ed. 220 (1886). . .. Police officers who misuse their authority [under the 'purely objective' approach] may expect to be defendants in civil suits seeking substantial damages for discriminatory enforcement of the law.

Fifth, the Equal Protection clause prohibits government from selectively prosecuting individuals based on race, religion, or other arbitrary classifications. *See Wayte v. United States*, 470 U.S. 598, 608 (1985).

Sixth, citizen boards and internal police department investigations can act as a check on racially discriminatory behavior of individual police officers.

For these reasons, the fear of discriminatory enforcement need not be the unfortunate catalyst for an unnecessary and unwarranted structural change in Fourth Amendment law.

CONCLUSION

This Court should uphold the decision of the court of appeal by adopting the only workable standard for analyzing the constitutionality of traffic stops: the "purely objective" approach. This Court should not add a new and unnecessary level of scrutiny to its traditional standard of review when deciding the propriety of limited seizures.

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